APPENDIX.

CARROLL'S KENTUCKY STATUTES.

EDITION 1915.

CHAPTER 125a.

(Act March 19, 1898.)

TELEGRAPH COMPANIES.

§4679c. 1. *Right of to erect and operate lines.* That a telegraph company chartered or incorporated by the laws of this or any other State, shall, upon making just compensation, as hereafter provided, have the right to construct, maintain and operate telegraph lines through any public lands of this State, and on, across and along all highways and turnpikes, and across and under any navigable waters, and on, along and upon the right of way and structures of any railroad in this State: *Provided,* That the posts, arms, insulators and other fixtures of such telegraph lines be erected and maintained in the usual manner of constructing, operating and maintaining telegraph lines on or along and upon the right of way of railroads, and on, across and along the highways, and across and under navigable waters, and in such manner as not to interfere with the ordinary use or the ordinary travel and traffic on such highways, railroads or waters, or that of any other telegraph line already constructed on the right of way of any railroad.

2. *Contract for right of way along railroads and highways.* That whenever any telegraph company desires to construct, operate and maintain its lines on, along or upon the right of way and structure of any railroad, or upon and along the roadways of any incorporated turnpike, it may through an authorized agent agree and contract with such railroad and turnpike companies for such right.

3. *Petition for condemnation proceedings may be filed.* That in case any telegraph company having the rights and privileges herein granted is unable to agree with such railroad or turnpike company for the exercise of such rights and privileges, such telegraph company may file its petition, sworn to by its agent, in the office of the clerk of the county court of any county in which any portion of such railroad or turnpike is situated or may run, and one proceeding shall be sufficient to condemn the right of way herein provided for of any railroad or turnpike in this State. Said petition shall designate the railroad or turnpike as the case may be, and the particular use, right, easement or privilege sought to be condemned, and shall state the name of the petitioner, where incorporated, how, and in what manner, and with what kind of material it proposes to construct its telegraph line, and that it has complied with the Constitution of this Commonwealth in regard to such corporations seeking to exercise right of eminent domain. An application in writing by an authorized agent of such telegraph company, delivered to the

president or any general officer of any railroad or turnpike company, proposing to agree with such company upon the compensation to be paid and offering therefor a sum certain for such rights and privileges, not accepted in ten days thereafter, in writing by such president, general officer, or some one else duly authorized, may be treated as a failure to agree with such railroad or turnpike company.

4. *Proceedings upon petition—summons—jury—oath to jury.* That such petition, as hereinbefore provided for, may be filed at any time, and the proceedings thereunder had shall be *in rem* against such railroad and structures and turnpike roadway, and, upon the filing of such petition, the clerk of said county court shall issue a summons, which shall be executed by the sheriff, upon any agent of such railroad or turnpike company in said county notifying said railroad or turnpike company of such proceedings and to appear at the next term of the said county court to be held in and for said county, and make any lawful defense thereto if it sees proper so to do. This summons must be served upon such agent at least ten days before the terms of court to which it is returnable, and such clerk shall also issue a writ of *fieri facias,* commanding the sheriff to summons and have on the first day of said court to which said cause is returnable, a special venire of eighteen good and lawful men, citizens, and qualified jurors of said county to serve as jurors in said cause. To which jurors either party may have as many challenges,

and for the same causes, as in the trial of other civil causes in the circuit courts of this Commonwealth, and from said special venire and talesmen, if necessary, a jury of twelve shall be impaneled, who shall be sworn by the clerk or judge of said court, as follows: "I do solemnly swear that as a member of this jury, I will a true verdict render in this cause, assessing for the defendant the actual cash value of so much of its land as may be shown by the proof will be actually taken and occupied by the petitioner, and such other incidental damages, if any, as shown by the proof will accrue to the remainder of the right of way for the purpose for which it is held by the defendant, by reason of the construction of petitioner's telegraph line in the manner set out in the petition, so help me God."

5. *Evidence that may be introduced—measure of damages.* That the court shall admit any relevant testimony either party may offer to prove the cash market value of the land that will be taken and occupied by the petition, and all actual damages that will accrue to the defendant in the diminution of the value of the remainder of its right of way for railroad or turnpike purposes, as the case may be, by reason of the construction of the telegraph line upon such right of way in the manner set out in the petition, and in considering incidental damages to the defendant, they may take into consideration any advantages that may accrue to the defendant as shown

by the proof, by reason of the construction of such telegraph line.

6. *Verdict, form of.* The jury shall not be required to go upon or view such right of way, and shall return their verdict on the form following: "We, the jury, assess the damages and just compensation to be paid ——— by the ——— to be dollars ———;" and the form of the verdict may be given the jury by the court.

7. *Judgment, form of.* That upon the return of the verdict the court shall enter up a judgment as follows: "In this case, the claim of the——— Telegraph Company, to have condemned for its use the right to construct, operate and maintain the line of telegraph upon the right of way of the defendant in this State, in the manner set out in its petition, was submitted to a jury composed of (here insert the names), on the —— day of ——— A. D., ———, and said jury returned a verdict fixing said defendant's due compensation and damages at dollars ———, and the verdict was received and entered. Now upon payment of said award either to the defendant or to the clerk of this court, and all costs in this behalf expended, said ——— Telegraph Company may enter upon said land and appropriate so much thereof as may be necessary, as prayed for in its petition."

8. *Appeal—supersedeas bond and effect.* That either party shall have the right to appeal from said judgment to the Court of Appeals, within thirty days

after the rendition of said judgment, upon entering into bond with sureties, to be approved by the court or judge in vacation in the sum of two hundred dollars, conditioned to pay all costs that may be adjudged against it if said cause shall be affirmed. But an appeal by the defendant shall not operate as a supersedeas provided the telegraph company shall enter into bond with sureties to be approved by the court in double the amount of the award payable to the defendant in case said cause shall be reversed, and upon the execution of such bond may construct its telegraph line upon the right of way as prayed for in its petition.

9. *Mortgagee need not to be notified—proceeding if mortgage on land condemned.* That no notice of the condemnation proceedings herein provided for, shall be given to any mortgagee of the defendant, but in the event there be any mortgage recorded in the county where such proceedings are had, upon the property condemned, then the damages and compensation awarded by the jury shall be paid to the clerk of said court, whose duty it shall be forthwith to mail written notice of such proceedings, and of said award, to the mortgagee or trustee named in said mortgage, who may contest with the said defendant for the same, if he sees fit so to do.

10. *Damages assessed at instance of railroad or turnpike—effect of tender.* That if any telegraph company has heretofore constructed its line of telegraph upon the right of way of any railroad or turn-

pike company in this State, such railroad or turnpike company shall petition the county court of any county through which said line is constructed, to have its damages and compensation assessed against such telegraph company, and like proceedings shall be had as if instituted by such telegraph company as herein provided for, and the payment by such telegraph company of the award that may be made in such case, shall entitle such telegraph company to maintain and operate its telegraph line as if it had been constructed by virtue of this act, and in such proceedings the telegraph company shall pay the cost of such suit, unless it shall, before such suit be instituted, offer to pay such railroad or turnpike company a sum more than the award of the jury, and, if the award of the jury be less than the sum offered by such telegraph company for such right or privilege, then the cost of said proceedings shall be adjudged against such railroad or turnpike company, as the case may be, and the failure to institute such proceedings by such railroad or turnpike company within ninety days after this act shall take effect, be a waiver of its right to recover damages in any amount or in any proceedings against such telegraph company for the use and occupation of so much of its right as is used by said telegraph company.

11. *Compensation of court officers and jury.* That the officers of the said court and the jury shall be allowed the same compensation for their services as by law are allowed in civil suit for like services.

12. *Repealing clause.* That all laws in conflict with this act be, and the same are hereby, repealed. (This section is an Act of March 19, 1898; the numbers of the subsections are the numbers of the sections of the Act.)

CARROLL'S KENTUCKY STATUTES.

EDITION 1915.

RAILROAD COMPANIES—CONDEMNATION OF LAND.

Section 835. When any company authorized to construct a railroad shall be unable to contract with the owner of any land or material necessary for its use for the purpose thereof, it shall file in the office of the clerk of the county court, a particular description of the land and material sought to be condemned, and may apply to the county court to appoint commissioners to assess the damages the owner or owners thereof may be entitled to receive, and thereupon the said court shall appoint three impartial housekeepers of the county who are owners of land, and who shall be sworn to faithfully and impartially discharge their duties under this law.

Section 836. It shall be the duty of said Commissioners to view the land and material, and to award to the owner or owners the value of the land or material taken, which shall be stated separately; and

they shall also award the damages, if any, resulting to the adjacent lands of the owner, considering the purposes for which it is taken; but shall deduct from such incidental damages the value, if any, of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. They shall return a report, in writing, to the office of the clerk of said court, stating their award, and shall describe, in their report, the land and material condemned, give the names of the owners, and whether non-residents of the state, infants, of unsound mind, or married women.

Section 837. Upon the application of said company, and upon filing such affidavits as may be necessary, the clerk of said court shall issue process against the owners to show cause why the said report should not be confirmed, and shall make such orders as to non-residents and persons under disability as are required by the Civil Code of Practice in actions against them in the Circuit Court.

Section 838. At the first regular term of the county court, after the owners shall have been summoned the length of time prescribed by the Civil Code of Practice before an answer is required, it shall be the duty of the court to examine said report, and if it shall appear to be in conformity to this law, and to the extent that no exceptions have been filed thereto by either party, it shall confirm said report as against the owners not excepting.

Section 839. When exceptions shall be filed by either party, the court shall forthwith cause a jury to be impaneled to try the issues of fact made by the exceptions, and each juror shall be allowed one dollar per day for his services, to be taxed as cost. In assessing the damages the jury shall be governed by the rule prescribed in Section 836 of this law, and, upon the request of either party, may be sent by the court, in charge of the sheriff, to view the land or material. If sufficient cause be not shown for setting aside the verdict, the court shall render judgment in conformity thereto, and shall make such orders as may be proper for the conveyance of the title upon the payment of the damages assessed. Either party may appeal to the Circuit Court, by executing bond as required in other cases, within thirty days, and the appeal shall be tried *de novo,* upon the confirmation of the report of the Commissioners by the county court, or the assessment of damages by said court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the Commissioners when confirmed, or as shown by the judgment of the county court when the damages are assessed by said court, and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land and material, and to use and control the same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the county court by the company, it

shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs. All money paid into court under the provisions of this law shall be received by the clerk of the court and held subject to the order of the court, for which he and his sureties on his official bond shall be responsible to the persons entitled thereto.

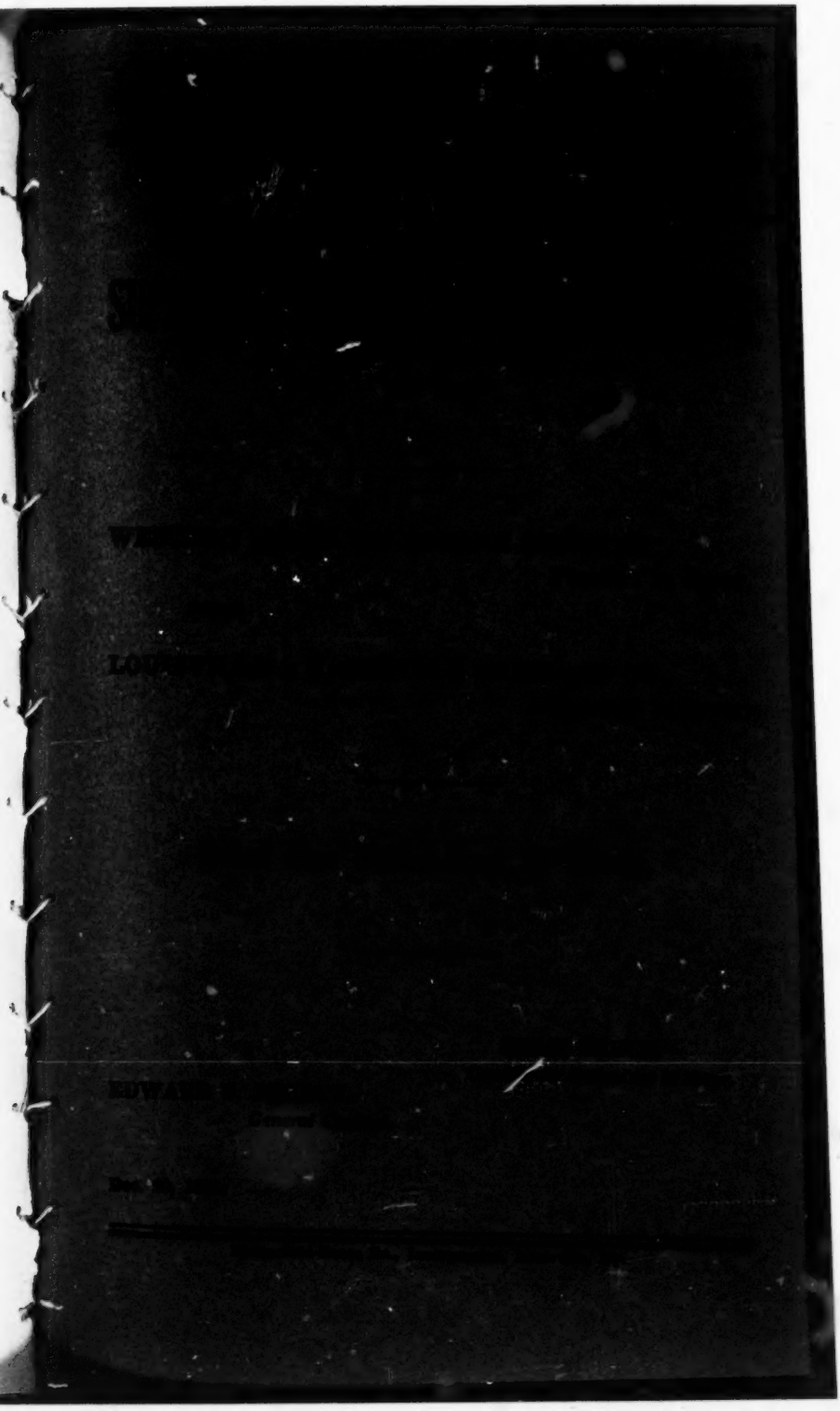
Section 840. The appeal from the county court shall be taken by filing with the clerk of the court to which the appeal lies a statement of the parties to the appeal, and a transcript of the orders of the county court, and thereupon the said clerk shall certify to the clerk of the county court that said appeal has been filed, and the clerk of the county court shall immediately transfer the original papers to the clerk of the court to which the appeal is pending; and if the owner on his appeal shall fail in the Circuit Court to increase the amount of damages awarded in the county court, he shall pay all the costs of the appeal; if the damages are increased in the Circuit Court, the other party shall pay all the costs of the appeal. The same rule as to payment of costs shall apply when the appeal is prosecuted by the party seeking to condemn land.

AN ACT to Incorporate the Elizabethtown, Lexington & Big Sandy Railroad Company, Approved January 29, 1869. 1 Ky. Acts 1869, p. 216.

§13. That the president and directors, or a majority of them, or their authorized agents, may agree with the owners of any land, earth, stone, timber, or other materials or improvements which may be wanted for the construction or repair of said road or any of their works, for the purchase in fee simple, or the use and occupation of the same; and if they cannot agree, or if the owner or owners of any of them be a *feme covert,* under age, *non compos mentis,* or out of the county in which the property may lie, application may be made to any justice of the peace of said county, who shall, thereupon, issue his warrant, directed to the sheriff or any constable of said county, requiring him to summon twenty discreet men, not related to the owner, nor in any way interested, to meet on the land, or near the property or materials to be valued, on a day named in said warrant, not less than ten nor more than twenty days after the issuing of the same; and if, at the time and place, any of the said jurors do not attend, said sheriff or constable shall forthwith summon as many jurors as may be necessary, with the jurors in attendance, and from them each party, if present, or, if not present, by agent or otherwise, the sheriff or constable, for the party absent, may strike off four jurors, and the remaining twelve snall act as the jury of inquest

of damages. The sheriff or constable may adjourn the jury from day to day; and if they cannot agree upon a verdict, it shall be his duty to discharge them and summon another, to meet as soon as convenient. Before the jury acts, the sheriff or constable shall administer to them an oath or affirmation, that they will justly and impartially fix the damages which the owner or owners will sustain by the use and occupation of said property required by said company; and the jury, in estimating the damages, shall find the owner or owners the actual value of the land or other thing proposed to be taken; but in estimating damages resulting incidentally to the other land, or other property of such owners, they shall offset the advantages to such residue to be derived from the building and operating of said road by, through, or near such residue. The jury shall reduce their verdict to writing, and sign the same, and it shall be returned by the sheriff or constable to the clerk of the circuit court of his county, and such clerk shall receive and file it in his office; and such verdict shall be confirmed by the circuit court at its next regular term, if no sufficient reason is shown by either party for setting it aside; and when so confirmed, it shall be recorded by the clerk, at the expense of said company; but if set aside, the court shall direct another inquisition to be held by the sheriff of the county in the manner above prescribed: *Provided,* That the company may proceed to construct their said road as soon as the first verdict of the jury shall be returned, whether

the same be set aside and a new jury ordered or not; and every inquisition shall describe the property or the bounds of the land condemned, and the duration of interest in the same, valued for the company; and such valuation, when tendered or paid to owner or owners of said property, or to the sheriff of the county in which said inquest is held, when the owner or owners do not reside in such county, shall entitle said company to the use or interest in the same thus valued as fully as if it had been conveyed to it by the owner or owners of the same; and the valuation of the same, if not received when tendered, may, at any time thereafter within one year, be received from the company without costs or interest by the owners, his, their, or its legal representatives; *Provided,* That land condemned for roadway shall not be more than one hundred feet wide, unless said company shall file with the justice, at the time of applying for a warrant, the affidavit of some one of its engineers, stating that a greater width is necessary, and how much more is required, when the inquisition shall be for the quantity thus stated.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 259.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This is a condemnation suit. The Western Union Telegraph Company instituted it against the Louisville & Nashville Railroad Company, in the District Court of the United States for the Western District of Kentucky, seeking to condemn a right of way for the pole and wire lines of plaintiff along the rights of way of defendant in the State of Kentucky, aggregating at the time of the last trial about one thousand miles. After several years of litigation, the District Court dismissed plaintiff's petition on the ground that the United States Circuit Court of Appeals of the Sixth Circuit, in another suit between the same parties, had decided that by an act of the General Assembly of Kentucky, passed during the pendency of this condemnation case *"the power of the plaintiff*

herein to condemn or take any of the property or rights sought to be condemned and taken in this action, *was withdrawn and taken away by said act"*; and that at the time of the withdrawal of such power of condemnation no vested right had been acquired by plaintiff to any property sought by it to be condemned; and, therefore, the petition should be and was dismissed.

To reverse that judgment this writ of error is prosecuted.

In order that the Court may fully understand the case, it is necessary to make a somewhat extended statement of facts. On July 9, 1912, the Western Union Telegraph Company, as said above, instituted this condemnation proceeding against the Louisville & Nashville Railroad Company, in the United States District Court for the Western District of Kentucky; the purpose being to condemn a right of way for the plaintiff's pole and wire lines along the defendant's rights of way in Kentucky. These lines of the plaintiff were already in place when the suit was instituted, and the purpose of the suit was to condemn the right to keep them thus in place. They had been erected under a contract between the two companies (Rec. 70), which, by its terms, was to continue for twenty-five years from June 18, 1884 and until one of the parties should give written notice to the other of a termination of the contract at the end of one year from the notice (Rec. 76). The Telegraph Company gave this notice on August 17, 1911, that the

contract would be terminated on August 17, 1912 (Rec. 41). When nearly eleven months of the year had expired, to wit, on July 9, 1912, this condemnation suit was instituted.

The Railroad Company notified the Telegraph Company that after the expiration of the contract (under the Telegraph Company's notice), the property of the Telegraph Company must be removed from the property of the Railroad Company, and that this removal must be completed not later than November 30, 1912, thus allowing a reasonable time for removal (Rec. 38).

On October 14, 1912, the Telegraph Company filed in the same Court in which the condemnation proceeding was pending, *a bill in equity* against the Railroad Company, in which bill is set forth the pendency of the condemnation suit (the present suit), and pleaded that the Telegraph Company was in possession of the right of way sought to be condemned, but that the Railroad Company was threatening to expel it therefrom, and praying that defendant *be enjoined* from carrying into effect these threats (Rec. 157).

In this injunction suit a temporary injunction according to the prayer of the bill, was granted on December 28, 1912, enjoining the Railroad Company "for six months from this date, or until the further order of the Court, with power in the Court from time to time to enlarge said designated period" from interrupting plaintiff in its use of said pole and wire

line on defendant's property (Rec. 158). And this "temporary" injunction was continued in force from time to time until finally dissolved, eight years thereafter, in the fall of 1920 pursuant to the judgment and mandate of the United States Circuit Court of Appeals, as will be hereafter mentioned.

In the condemnation case (the present case) a trial was had, resulting in a verdict of a jury on April 3, 1913, fixing the condemnation damages at $500,000 (Rec. 104). On petition for a new trial by the Telegraph Company the Court set aside this verdict on December 13, 1913 and ordered a new trial (Rec. 110). When the case came on for a new trial the District Court, on motion of the Telegraph Company, tried the case, without the intervention of a jury, on the question of "necessity for the condemnation," and upon the further question of whether or not the use of the lines by the Telegraph Company would so unreasonably interfere with the use of the railroad rights of way as to forbid condemnation, this being under the peculiar language of the Telegraph Condemnation Statute, Sec. 1, Appendix. And the Court determined both those questions in favor of the Telegraph Company on January 29, 1916 (Rec. 131), and then ordered a jury trial on the question of damages. This trial was had on February 16, 1916, resulting in a *peremptory direction by the Court* to the jury to fix the damages at $5,000. This was at the nominal amount of *$5.00 a mile* for the condemnation of practically 1000 miles of right of way.

The jury did as instructed, and thereupon a judgment of condemnation was entered upon that verdict (Rec. 141).

Plaintiff never paid or tendered the amount of this judgment to the defendant, but it did pay the same into Court, claiming that it was authorized so to do (Rec. 144).

A writ of error from the Circuit Court of Appeals was prosecuted by the Railroad Company, defendant assigning errors both in relation to the trial *by the Court* and the trial *by the jury*. The result was a reversal of the judgment with directions to the District Court to set aside both (1) the *finding of the Court* on the question of necessity and of unreasonable obstruction, and (2) also the *verdict of the jury* on the question of damages (Rec. 211, 225).

This mandate was filed in the District Court and the case restored to the docket of that Court on December 7, 1918 (Rec. 149). Thereupon defendant moved the Court to enter an order in express terms setting aside (1) both its former finding on the questions of necessity and unreasonable interference and (2) also the jury's verdict (Rec. 150). The District Court overruled this motion on the ground that such action would be superfluous (Rec. 151). And the Circuit Court of Appeals on application for a rule against Judge Evans to show cause why he should not enter the order, denied the motion for the rule, on the ground that it was unnecessary to enter the order defendant had asked, as such was the *necessary*

effect of the action of the Circuit Court of Appeals; the Court saying:

"United States Circuit Court of Appeals for the Sixth Circuit.

No. 3266.

In re Louisville & Nashville Railroad Company, Petitioner.

The motion of the Louisville & Nashville Railroad Company for a rule on the Honorable Walter Evans, United States District Judge for the Western District of Kentucky, to show cause why he should not enter a certain proposed order pursuant to our mandate in Louisville & Nashville Railroad Company, Plaintiff in Error v. Western Union Telegraph Company, Defendant in Error, No. 2952, coming on to be heard upon the motion papers, and;

It appearing therefrom that such mandate issued in a proceeding taken by writ of error to revise a judgment at law in the court below, which judgment was reversed by this court; that such judgment of reversal necessarily, unless otherwise specified, operates to vacate not only the judgment below but also *any finding* or *verdict* upon which the same may be based, and *to leave the action for new trial as if no finding or verdict had been made;* that in such cases at law there is no necessity for any order in the court below formally vacating the former proceedings; and that in this case there is no reason to anticipate that the District Judge intends to or will give *any further force or effect* to such *finding* or *verdict.*

Ordered; that leave to file the petition be granted; that the motion for rule to show cause be denied; and that the petition be dismissed. (Rec. 154.)

On February 15, 1919 the Railroad Company filed amended and supplemental answers, both in the condemnation suit and in the injunction suit, in each of which it pleaded that the Legislature of Kentucky had *repealed the statute giving the Telegraph Company the power of condemnation,* thus withdrawing the power, and had *forbidden* the Telegraph Company to condemn a right of way longitudinally along the right of way of a Railroad Company (Rec. 155).

To this amended answer the Telegraph Company filed a reply, in which it *pleaded the pendency of the injunction suit* and the issue of the temporary injunction therein, enjoining the Railroad Company from interfering with its use of the railroad right of way; and claimed further that the legislative act referred to did not properly bear the construction attributed to it, and that, if it did, it was unconstitutional. (Rec. 157.)

The defendant filed a demurrer to this reply, and also made, in each case, a motion to dismiss; and the demurrer and motions were submitted (Rec. 160).

The District Court delivered an elaborate written opinion applying on its face *to both cases,* in which it decided that *the power of condemnation had not been withdrawn,* and, therefore, overruled the motion to dismiss in each case and overruled the motion to dissolve the injunction in the equity case. (Rec. 161, 171, 183, 184.)

Writ of error could not be prosecuted to reverse the order refusing to dismiss in the condemnation

case, because it was not a final order; but an appeal was prosecuted to the Circuit Court of Appeals from the order refusing to dissolve the injunction in the equity suit. On the hearing of the appeal *both parties urged upon the Circuit Court of Appeals to decide upon that appeal the question of the effect of the statute upon which defendant relied as withdrawing the power of condemnation.* And the Circuit Court of Appeals *so states in its opinion* (Rec. 202; 268 Fed. 6).

On July 29, 1920 the Circuit Court of Appeals reversed the order overruling the motion to dissolve the injunction, and ordered it to be dissolved, holding, in a very elaborate opinion, *that the power of condemnation had been withdrawn*, and that there was no occasion for any longer continuing the injunction to protect a proceeding which would have to be dismissed (Rec. 201; 268 Fed. 4). A petition for rehearing was filed by the Telegraph Company in the Circuit Court of Appeals, but was overruled October 15, 1920; the Court again delivering a written opinion on account of a new question raised by the Telegraph Company for the first time in a "Supplemental petition for rehearing," being one of the questions again urgently pressed in the present case (Rec. 209; 268 Fed. 13).

An application was made to this Court for writ of *certiorari* to review this ruling of the Circuit Court of Appeals and in its petition for *certiorari* in the equity case the Telegraph Company said: *"In the case at bar it has been the object of both parties to test*

the vital question of your petitioner's right to condemn before going to the expense of another trial in the condemnation suit" (Page 14). The application for certiorari was denied by this Court on December 6, 1920 (254 U. S. 650).

After the decision of the Circuit Court of Appeals in the injunction suit, the defendant in the present case, the condemnation case, again moved the Court to dismiss it, the condemnation case, and tendered a form of judgment of dismissal, which it asked to have entered (Rec. 184).

This tendered form of judgment is not embraced in the original printed record, although called for by the schedule, having been omitted by mistake, but it has been supplied by a stipulation which has been printed and placed with the record, from which it appears that the judgment, thus tendered by the defendant, was in the following form:

> "This day came the parties hereto, by counsel, and it appearing to the Court from the opinion of the United States Circuit Court of Appeals for the Sixth Circuit in the case of Louisville & Nashville Railroad Co. v. Western Union Telegraph Co. on appeal from the decree of this Court in the equity suit of Western Union Telegraph Co. v. Louisville & Nashville Railroad Co. (No. 105) that said Circuit Court of Appeals has decided that the power of said Western Union Telegraph Co. to condemn the property of the Louisville & Nashville Railroad Co. sought to be condemned in this action was withdrawn by the State of Kentucky by the act of its General Assembly, approved March 14, 1916, heretofore

pleaded in this action, and that said withdrawal took place before any rights had become vested in the Western Union Telegraph Co., and that this action or proceeding must, therefore, fail, it is now, therefore, ordered, adjudged and decreed by the Court that for said reasons the order heretofore entered overruling the motion to dismiss this action be, and it is hereby, set aside, and that this action for said reasons be, and it is now hereby, dismissed, and that defendant recover of plaintiff defendant's costs herein expended, for which it may have execution."

Plaintiff objected to the motion to dismiss and filed an amended reply (Rec. 186) to the amended and supplemental answer of defendant pleading the Act of the Kentucky Legislature, in which reply it claimed that the condemnation suit should proceed, because it had acquired a *vested right* in the property sought to be condemned before the repealing act took effect, and that it was, therefore, not affected thereby; that being the question it had raised by the "supplemental petition for rehearing" in the equity suit in the Circuit Court of Appeals, and which that Court had decided against it. And it also filed written objections to the motion to dismiss, making practically the same point (Rec. 187).

To the reply defendant demurred (Rec. 187). And thereupon the following judgment was entered on January 22, 1921:

"And the Court being now sufficiently advised, it is ordered and adjudged that said demurrer to said reply as amended be, and it is

now, sustained, to which plaintiff excepts, and thereupon plaintiff declined to plead further herein.

"And, *pursuant to its interpretation of the ruling of the Circuit Court of Appeals in the auxiliary equity suit growing out of this action, it is now considered and adjudged by the Court* that by the Act of the General Assembly of the Commonwealth of Kentucky entitled 'An Act to protect Railroad Companies in the use and the enjoyment of their rights of way by forbidding the condemnation thereof' and for other purposes, approved March 14, 1916, the power of the plaintiff herein to condemn or take any of the property or rights sought to be condemned and taken in this action, was withdrawn and taken away by said Act, to which ruling the plaintiff excepts. And accordingly it is now further considered and adjudged by the Court that at the time of such withdrawal of the right given by said Act no vested right had been acquired by plaintiff to any property or right sought by it to be condemned or taken herein, to which ruling of the Court the plaintiff excepts. And it is further considered and adjudged by the Court that no provision of said Act of March 14, 1916, violates or is in violation of the Constitution of Kentucky, and that no clause or provision of said Act is violative of the Constitution of the United States, nor of any amendments thereto, to each of which rulings plaintiff also excepts. And it is further considered and adjudged by the Court that the plaintiff's petition herein should be and it is dismissed, to which the plaintiff excepts.

"And it is further adjudged by the Court that the defendant recover of the plaintiff the defendant's costs expended herein, as the same may be properly taxed by the Clerk, and that the

defendant may have execution therefor, to which ruling the plaintiff also excepts" (Rec. 185).

On January 25, 1921, plaintiff filed a petition for writ of error and an assignment of errors and tendered a bond, whereupon the Court allowed the writ of error and approved the bond (Rec. 191).

On February 19, 1921, which was still within the term at which the judgment was entered and the writ of error allowed, the defendant, in order that every question in the case might be brought before this Court at one time, and thinking that possibly the decision of the Circuit Court of Appeals in the injunction suit should be more formally pleaded in this condemnation suit, although the pendency and purpose of the injunction suit had already been pleaded in this suit by the plaintiff itself, and the judgment of dismissal in this suit had been *in express terms based upon that decision,* moved the Court to set aside the order allowing the writ of error and approving the bond and to set aside the judgment of dismissal of January 22, 1921, and to permit defendant to withdraw its demurrer to the reply, and in lieu thereof to file a rejoinder, which was tendered, pleading the decree of the Circuit Court of Appeals in the injunction suit (Rec. 197).

The District Court, however, believing it had no power to do this, declined to entertain or pass upon the motion of defendant, but gave it leave to file a bill of exceptions (Rec. 197), whereupon a bill of exceptions was filed and approved, in which defend-

ant set forth the proceedings just mentioned, including the rejoinder tendered, to which was annexed, as an exhibit, the opinion of the Circuit Court of Appeals in the injunction suit (Rec. 198-211).

Of course if it should be held that the Court improperly sustained defendant's demurrer to the reply, and that the Court cannot properly consider the question of *res adjudicata* on the record as it stands, defendant would still have a right on the return of the case to the District Court to file a rejoinder and specifically plead the judgment of the Circuit Court of Appeals. But it is to the interest of all parties that this litigation which has been pending nine years be brought to a conclusion, and hence that all questions manifestly involved in it be now decided by this Court. And we believe the question of the effect on this case of the decision by the Circuit Court of Appeals in the injunction suit between the same parties of the very questions now sought to be reopened and relitigated in this case—a decision specifically invited in that case by plaintiff in order that the questions might not have to be decided in this case—does sufficiently appear to be considered and determined by this Court at this time.

ARGUMENT.

RES ADJUDICATA.

Every litigant is entitled to his day in Court. But no litigant is entitled to two different days in Court, in two different causes between him and the same opposing party, on the same "right question or fact." And every question upon which plaintiff in error asks the decision of this Court, as between it and the defendant in error (Louisville & Nashville Railroad Company) was decided by the United States Circuit Court of Appeals on the appeal in the injunction suit between these same parties, after a hearing, in which both parties urged upon the Court to decide the fundamental question which it did decide, to wit, as to the meaning and effect, including the validity, of the act of the Kentucky Legislature of March, 1916, prohibiting the condemnation of a railroad right of way longitudinally by a Telegraph Company. And after that decision the Telegraph Company petitioned this Court for a writ of *certiorari* to review it, which petition this Court denied on December 6, 1920.

The Telegraph Company's own pleading in this condemnation case shows the pendency of the injunction suit and what it involved (Rec. 157). The opinion of the District Court in this case shows that it was delivered in both the injunction suit and the condemnation case, that opinion setting forth the facts as to the condemnation case at Record, p. 161,

and the facts as to the injunction suit at Record, p. 171, and stating how the questions were raised in the two cases, and saying: "Those questions are, in all essential respects, the same in both cases, and may be disposed of in one opinion" (Rec. 174). The District Court held that the motion to dismiss the condemnation case and the motion to dissolve the injunction in the equity suit must both be overruled, because in the Court's opinion the power of condemnation *had not been withdrawn,* and directed that judgments accordingly be entered "in the respective suits" (Rec. 184).

As heretofore stated, writ of error could not be prosecuted to review the order refusing to dismiss the condemnation case, because it was not a final order, but an appeal was taken from the order overruling the motion to dissolve the injunction in the equity case, as was permissible of course under the statute governing such cases.

When the case reached the Circuit Court of Appeals for argument, both parties were anxious that the Court of Appeals should settle the question as to the effect of the legislative Act of 1916. Neither party wanted to go through a long, tedious condemnation trial (two trials of this kind having theretofore been had in the condemnation case, each trial lasting more than two weeks, and involving great labor, and the hearing of a multitude of witnesses). And thinking that possibly the Circuit Court of Appeals might decide the appeal in the injunction suit

without passing on the fundamental question of the effect of the Act of 1916, and might leave that question to be decided only after a final judgment in the condemnation case, therefore both parties stated to the Circuit Court of Appeals that they desired it to decide this elemental question in the case. And this is shown on the face of the opinion of the Circuit Court of Appeals as reported in 268 Fed. 6, as well as in this record, page 202, in which the Circuit Court of Appeals said:

> "In March, 1919, the Railroad Company tendered and filed in the injunction suit (207 Fed. 1, 252 Fed. 29) a supplemental answer alleging that the Act of 1898, upon which the condemnation suit rested, had been repealed, and that further prosecution thereof would be in violation of the law. It thereupon moved to dissolve the existing injunction, so far as this pertained to Kentucky. It also filed, in the condemnation case, a motion for dismissal upon the same ground. The motion to dissolve the injunction as to Kentucky was denied, and the Railroad Company brings this appeal.*
>
> "The substantial question involved is whether the repeal of the 1898 law was effective as against this pending proceeding, *and all parties agree that this question may be considered and decided upon this appeal, without regard to the fact that it might be raised somewhat more directly in the condemnation case itself*" (268 Fed., p. 6).

And thereupon the Court entered into a most elaborate consideration of the questions raised by the

*It will be observed that the Court refers to the "injunction *as to Kentucky.*" This is because the injunction also covered the lines of the parties in other States, as well as Kentucky.

Telegraph Company as to the meaning and the validity of the Act of 1916. And the Court determined that the Act prohibited the condemnation of a railroad right of way longitudinally by a Telegraph Company, and that it applied to this particular condemnation involved in this suit; and that, therefore, the injunction should be dissolved, because it had only been granted to protect the rights of the parties pending the condemnation proceedings; and as the power to condemn had been withdrawn, there was nothing to protect.

After the opinion of the Circuit Court of Appeals had been rendered, the Telegraph Company filed first a petition for rehearing and then a supplemental petition for rehearing, in which latter paper the Telegraph Company made the point, *for the first time,* that by the law of Kentucky when the jury in a condemnation case assesses the damages and the condemnor pays or tenders the amount of the award, *the title vests and is unaffected by any subsequent reversal on appeal* or writ of error; and, therefore, that the title had vested in this particular case before the Act of 1916 was passed, notwithstanding the fact that the judgment of condemnation, upon which it based its claims, was reversed on writ of error. *The Circuit Court of Appeals considered this question in a careful opinion on the petition for rehearing, but decided against the Telegraph Company and denied the petition* (268 Fed. 13; present record, 209).

The petition to this Court for a writ of *certiorari* to review this ruling of the Circuit Court of Appeals was then filed, in which, as heretofore stated, counsel for the Telegraph Company expressly stated *that the object of both parties had been to test* IN THAT CASE *the vital question of the Telegraph Company's right to condemn, before going to the expense of another trial in the condemnation suit.* The petition for a writ of *certiorari* to bring that case to this Court was denied; but that does not mean that the parties did not have *their day in Court* on this "vital question" in the Circuit Court of Appeals and District Court, in a suit which the Telegraph Company itself instituted. In the great majority of cases decided by the Circuit Court of Appeals, no review of the case by this Court is ever had.

Thus the Telegraph Company had in that case, a case which it had instituted, and in which it had invited a decision of the "vital question," the fullest and fairest hearing of the questions upon which it now asks a decision by this Court.

As said by Mr. Justice Brewer, speaking for the Supreme Court of Kansas, when he was a member of that Court, in *Smith* v. *Auld,* 31 Kas. 262, 1 Pac. 626:

> "The whole philosophy of the doctrine of *res adjudicata* is summed up in the simple statement *that a matter once decided is finally decided,* and all the learning that has been bestowed and all the rules that have been laid down, have been for the purpose of enforcing that one proposition" (page 628).

This Court in *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, held that in a second suit, involving even a *different piece of property* from that involved in a previous suit, any "right, question or fact" determined in the first suit must be treated as *res adjudicata* in the second suit between the same parties; and in that case held that the determination in the first suit that *a particular map introduced in evidence* was a valid map, conforming to the laws of the United States, must be accepted as a question finally settled in another suit between the same parties about a different piece of property, where that map again came into question. The Court's review of that subject was concluded in the following language:

> "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them" (pages 48, 49).

It is contended, however, by counsel for the Telegraph Company that the principle of *res adjudicata* only applies to final judgments, and that the judgment of the Circuit Court of Appeals in the case re-

ferred to was not a final judgment, because it was rendered on an appeal from an order refusing to dissolve a temporary injunction. Let us briefly consider both of these objections.

1. We may again refer to an opinion delivered by Mr. Justice Brewer when he was a member of the Supreme Court of Kansas, in *Wilson & Co.* v. *McIntosh,* 30 Kas. 231, 1 Pac. 572, in which the Court said:

> "We think there is a growing disposition to enlarge the scope of the doctrine of *res adjudicata,* and to place more regard on the substance of the decision than on the form of the proceedings. One thing which indicates this is the increased facility of review in the appellate courts. It used to be the practice that no ruling of the trial court went up for review until after final judgment. Any preliminary rulings, if erroneous, might up to that time be corrected by the trial court. Then it was assumed that a final examination in that tribunal had been had, and the whole record was ready to be transferred to the appellate court, and hence it was argued that no prior decision should be considered as final or as *res adjudicata.* But our present practice provides for the taking immediately to the appellate court a vast number of rulings prior to the final judgment. Now that the decision of a motion can be preserved in a separate record, and taken up by itself, *presupposes a full and careful consideration in both the trial and appellate courts; and when that is had, it would seem that the question thus separately and carefully considered should be finally disposed of, and not be thrown back for further litigation at the mere caprice of either party.*" (1 Pac. 575.)

This Court knows, of course, that in many States appeals are allowed to the Supreme Court of the State from interlocutory orders, such as orders sustaining or overruling a demurrer to a pleading, etc.; this being, however, for the very purpose of settling the law of a case, and saving the expense of what otherwise might be a perfectly useless prolongation of the case. Does the Court suppose that in those States a decision of this kind by the highest Court of the State really settles nothing? If so, then the procedure is perfectly useless. Suppose, for example, that plaintiff demurs to the defendant's answer and the demurrer is sustained, and thereupon the defendant appeals, and the Supreme Court of the State reverses the judgment, and holds the answer to be good, and directs the demurrer to be overruled. Then suppose in such a case, after it returns to the lower Court, the plaintiff dismisses his suit, and subsequently brings the same suit over again, and the same answer is put in, is it to be supposed that the courts of those States will treat their decisions rendered under such circumstances as futile, and as settling nothing between the parties? Manifestly not.

In *Halvorsen* v. *Orinoco Mining Co.*, 89 Wis. 470, 95 N. W. 320, the Court said:

> "Orders made upon motions affecting substantial rights, from which an appeal lies, if the matter in question has been fully tried, are as conclusive upon the issues necessarily decided as are final judgments." (Citing cases, page 321.)

In *Jones* v. *Thorne*, 80 N. C. 72, there had been a motion for the appointment of a receiver to take charge of real estate. After a full hearing upon the proofs, it was overruled, and an appeal was taken from this order and it was affirmed. Subsequently another motion was made for the appointment of a receiver upon substantially the same grounds, but with fuller evidence, and the second motion was granted. From this order the defendant appealed and the Supreme Court of North Carolina, in reversing the judgment and directing the receivership to be discharged, said:

> "The facts are essentially the same now as those presented on the former appeal, when this Court held that a receiver ought not to be appointed, and the same considerations that brought us to that conclusion then must govern and control our decision of the same question now. That is more than a precedent and authority. It is a determination of the very point presented again.
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> "Precisely the same motion has been made and denied upon the ground of a want of title in the plaintiffs, or of an existing controversy in reference thereto, and this Court has affirmed the ruling and declared its full concurrence therein; and no reason is assigned for reversing that judgment and no error in rendering it has been pointed out. The matter has thus passed into and become *res adjudicata*. A party ought not to be harassed by successive motions for an order made in the progress of a cause, when the object of the motion, after a full investigation, has been refused, unless upon facts thereafter transpiring which makes essential a new and dif-

ferent case. *Nemo pro una et eadem causa bis vexare debet*" (Page 74).

We can imagine no reason why the original principle underlying the doctrine of *res adjudicata* should not apply in the present case, where an appeal was allowed from the ruling complained of in the District Court to the Circuit Court of Appeals, and where the case was as fully and as elaborately argued and considered, and as carefully determined, as if it had been on a decree final in form as well as in substance.

2. If substance be regarded rather than mere form, the judgment of the Circuit Court of Appeals *was final.* The sole purpose of the suit in equity, which the Telegraph Company brought against the Railroad Company, was to enjoin the Railroad Company from ejecting the Telegraph Company from the right of way, *until the condemnation proceedings could be determined.* That was the only relief sought. It was a case where relief had to be given by immediate action on the part of the Court, or not at all. If the temporary injunction had not been granted, the Railroad Company would have removed the Telegraph Company's poles and wires from the Railroad Company's property. And after this it would have been useless to proceed to a final decree in the injunction suit. There was no danger of the Railroad Company's attempting to remove the poles and wires of the Telegraph Company from the railroad right of way after a judgment of

condemnation should be obtained. All plaintiff desired was an injunction to continue in force *until the end could be reached of the condemnation trial.* And it was on account of this fact that the temporary injunction was continued from time to time *for eight years,* without ever any attempt to have a final decree in all that time. This was simply because a temporary injunction was all that was wanted, and all that was needed, and was the ultimate purpose of the suit. And when the Circuit Court of Appeals held that the power of condemnation in Kentucky had been withdrawn, this was the end of the whole matter. It was a decision of that which was "the vital question" in both cases. There was no longer any need for the injunction. The Court ordered the injunction to be dissolved, knowing that this was in effect a final judgment, because, as said before, if the injunction were dissolved, and the Railroad Company allowed to remove the Telegraph Company's poles and wires from the railroad right of way, *this would be in substance and effect the end of the injunction suit.* And we are satisfied that the only reason the Circuit Court of Appeals did not direct the dismissal of the injunction suit was that that suit applied, not simply to the lines in Kentucky, but to the respective lines of the two parties *all over the South,* in many States where the Telegraph Company's lines are upon the Railroad Company's lines, and where the right to condemn was not

in the least affected by the withdrawal of the power to condemn *in Kentucky.*

We repeat, therefore, that in substance, if not in form, the judgment by the Circuit Court of Appeals *was a final judgment,* and, as said before, was in effect invited as such by the Telegraph Company.

The question may be raised as to whether or not the facts to which we have referred sufficiently appear in this record. We submit that they do.

In the first place, as we have mentioned before, the pendency and nature of the injunction suit was pleaded in this condemnation case by the Telegraph Company itself in a reply to the amended answer of the Railroad Company, setting up the Act of March, 1916 (Rec. 157). Then the opinion of the District Court, which is a part of this record, shows that the motion to dissolve the injunction in the equity suit and to dismiss the condemnation suit were made at the same time, based on the same fact, viz., the passage of the Act of March 14, 1916, and were heard together, and disposed of in the same way and for the same reasons given by that Court, the Court saying with reference to the questions involved in the two cases: "Those questions are, in all essential respects, the same in both cases, and may be disposed of in one opinion" (Rec. 174). Then the motion of the Railroad Company for judgment, after the decision by the Circuit Court of Appeals, at which time a form of judgment of dismissal was tendered,

called to the Court's attention the fact and effect of the judgment of the Circuit Court of Appeals in the injunction suit, and asked the Court to dismiss the condemnation case on the ground that the Circuit Court of Appeals in the injunction suit had decided the questions fundamental to the condemnation case. And the District Court, in its judgment in the condemnation case, *states in terms* that it is entered by the Court on account of the rulings of the Circuit Court of Appeals in what the District Judge calls the "auxiliary equity suit growing out of this action" (Rec. 185).

Furthermore, with the petition for *certiorari* filed in this Court, seeking a review of the decree of the Circuit Court of Appeals in the injunction suit, there was filed a complete record of the injunction suit, including the decision of it by the Circuit Court of Appeals (the pendency of which suit, as heretofore mentioned, was pleaded by the Telegraph Company itself in the present case). And this Court, in the case of *Fritzlen* v. *Boatmen's Bank,* 212 U. S. 364, in a very similar situation, in a case which had come to this Court by a writ of error to the Supreme Court of Kansas, took judicial notice of what was shown by its own records, viz., the record of another litigation —a litigation in the United States Circuit Court between the same parties involving a certain phase of the controversy between them, what the District Court in the present case calls an "auxiliary suit" —which had been brought to this Court *by a petition*

for certiorari. In considering the record which had come to it from the Supreme Court of Kansas, the Court said:

> "The case was removed to the Supreme Court of Kansas by proceedings in error prosecuted by the various parties. Pending its determination—*taking judicial notice of our own records*—it is to be observed that the cause was decided *which was pending in the Circuit Court of Appeals for the Eighth Circuit,* resulting from the writ of error prosecuted from that Court to the judgment of the Circuit Court for the District of Kansas, dismissing for want of jurisdiction the replevin action referred to in the previous statement" (Page 370);

it further appearing from the opinion that the judgment dismissing the replevin suit was reversed by the Circuit Court of Appeals, and that a petition praying a writ of *certiorari* to review that judgment had been denied by this Court (page 371).

In other words, that was a case almost exactly like the present one, where two phases of a litigation between the same parties were involved in two different suits, the record of one of which got to this Court through a petition for *certiorari,* and the record of the other of which got to the Court through a writ of error. And this Court in the latter case took judicial notice of what was shown by the record in the former case.

But in the present case, in order to avoid any question as to whether or not the judgment of the Circuit Court of Appeals in the injunction case was

properly before the Court in the condemnation case, and because of its desire to get all questions in the case before this Court at the same time, the defendant in the condemnation case in the District Court, within the term at which the Court had entered the judgment and allowed the writ of error and approved the bond, moved the Court to set aside the order allowing the writ and approving the bond, and to set aside the judgment, and to permit defendant to withdraw its demurrer to plaintiff's reply and in lieu thereof to file a rejoinder, pleading in technical terms the decision of the Circuit Court of Appeals as *res adjudicata*.

And we submit that the District Court had the power to allow this proceeding to be had, and should have permitted it; and that this Court should consider the rejoinder there tendered, all of which is shown in the present record by a bill of exceptions duly presented, approved and filed.

We understand this Court to have held that where the allowance of a writ of error and the approval of a bond are judicial acts, acts of the Court, as distinguished from mere acts of the judge, the rule which universally prevails, to wit, that a Court has power over its judgments and decrees during the term at which they were rendered, applies to an order allowing a writ of error and approving a bond, as well as to any other order, judgment or decree. This we understand to have been settled by the cases of Goddard v. Ordway, 101 U. S. 745, 752; Draper v.

Davis, 102 U. S. 370, and Keyser v. Farr, 105 U. S. 266.

In the present case writ of error was allowed and the appeal bond was approved by an *order of Court,* a judicial act.

The record shows the following order entered on January 25, 1921:

> "This 25th day of January, 1921, came the plaintiff, by its attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error, accompanied with an assignment of errors intended to be urged by it; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on January 22, 1921, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.
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> "On consideration whereof *the Court* does allow the writ of error upon the plaintiff's giving bond according to law in the sum of $3,000.00, said bond to operate as a supersedeas.
>
> "Whereupon the plaintiff, with the American Surety Company as surety, executed a bond in the sum and as required by the foregoing order, which bond and surety are approved *by the Court"* (Rec. 191).

At the time the motion of the Railroad Company was made to set aside the order allowing the writ of error and approving the bond, the record had not been filed in this Court—in fact, it had not been copied by the clerk of the lower Court. And the Railroad Company's notice to counsel for the Tele-

graph Company of its purpose to make this motion on the day fixed in the notice was given several days before the citation on the writ of error was served. This notice was given and service thereof acknowledged on February 15, 1921 (Rec. 198). And the citation was not served until February 19, 1921 (Rec. 193), which was the day fixed in the Railroad Company's notice for making its motion (Rec. 198), and is the day upon which the motion was made (Rec. 199).

Of course if this Court should refuse to consider the question of *res adjudicata,* because not sufficiently pleaded, and should hold that the District Court should have overruled defendant's demurrer to plaintiff's reply, raising again the original question decided by the Circuit Court of Appeals in the equity suit, defendant would have a right upon the return of the case to the lower court, and after the entry of an order overruling its demurrer to the reply, then to file a *rejoinder* pleading *res adjudicata.* And it is on account of a desire to end this litigation, which has already been in prosecution for more than nine years, that defendant is anxious to get all of the questions involved in it before this Court on the present writ of error.

ACT OF MARCH 14, 1916, AND ITS EFFECT ON THIS PROCEEDING, CONSIDERED AS AN ORIGINAL QUESTION.

If the question of the Telegraph Company's power of condemnation is not *res adjudicata,* or if that question cannot be considered at the present time, then the original question remains to be considered now. And we, therefore, turn to it.

It is probably well at this time to briefly restate the main facts out of which the question for consideration arises, so that the Court may have those facts immediately in mind when it comes to decide the question. When this condemnation proceeding was instituted, the Telegraph Company was already in possession of the Railroad Company's right of way (which it now seeks to condemn), which possession had been taken under a contract between the parties; but which contract was about to terminate on August 17, 1912, under a notice of termination which the Telegraph Company itself had given.

This condemnation proceeding was instituted by the Telegraph Company on July 9, 1912. Upon a trial, which concluded on April 3, 1913, a jury fixed the damages at $500,000. On December 13, 1913, the District Court set this verdict aside and ordered a new trial. On January 29, 1916, the District Court, acting without a jury, determined that there was a "necessity" for the condemnation, and that the operation of the telegraph line would not unreason-

ably interfere with the railroad line, and ordered a jury trial upon the question of damages. At the conclusion of this jury trial on February 16, 1916, the Court peremptorily directed the jury to find a verdict for what was in effect a *nominal amount, five dollars a mile* for a thousand miles of right of way. This the jury did and the Court entered a judgment of condemnation on the verdict; providing in the judgment that plaintiff could pay the award either to the Railroad Company or to the Clerk of the Court, and that in the event of a payment to the Clerk of the Court, the Clerk should notify the various trustees under the Railroad Company's many mortgages, to the effect that the money had been paid into Court (these mortgagees not being parties to the case). And the judgment further provided that the payment of the award should *not be made to the Clerk* of the Court if the defendant should obtain and file with him *on or before May 15, 1916* a written consent of the trustees that the award should be paid to the defendant. The award was never paid or tendered to the defendant. And plaintiff was so anxious to pay this nominal judgment that, without waiting for the time at which, according to the judgment, it was authorized to pay the money into Court (May 15, 1916) and without any tender or notice to defendant, it paid the money into Court on March 8, 1916. No notice was ever given by the Clerk to any of the mortgage trustees of this payment into Court. *The money thus*

paid into Court has never been withdrawn by anybody.

Defendant promptly proceeded to prepare the record for a writ of error from the Circuit Court of Appeals to reverse this judgment. The bill of exceptions was in due time filed and approved and writ of error was allowed and issued, and the case thereby carried to the Circuit Court of Appeals for the Sixth Circuit. That Court *reversed the judgment of condemnation in toto;* the opinion concluding with the following words:

> "The proceedings upon the trial may be said to have been generally in accordance with the conclusions we have expressed; but it was otherwise in some vital particulars, and the *finding of the Court,* the *verdict of the jury* and the *judgment* entered thereon *must be set aside,* and the case remanded for new trial upon the question of amount of compensation, and for such further hearing and decision upon the question of the forbidden interference in specific places as we have indicated may be open" (Rec. 225).

After the return of the case to the District Court, the defendant filed an amended and supplemental answer, in which it pleaded in substance and effect that the Legislature of Kentucky had enacted a statute, approved March 14, 1916, whereby it forbade a Telegraph Company to condemn the right of way of a Railroad Company longitudinally, and repealed all acts and parts of acts in conflict therewith; and that thereby the power of condemnation, under

which the Telegraph Company had been proceeding in the existing case, had been withdrawn by the State of Kentucky, and that the Court, therefore, had no longer any power or jurisdiction to enter any order or judgment condemning any part of defendant's right of way for the use of the plaintiff, and that the proceeding should, therefore, be dismissed.

Plaintiff replied to this answer, pleading in substance that the Act of March 14, 1916, properly construed, did not apply to the pending condemnation suit, but that if it did so apply, then it was contrary both to the Constitution of the State of Kentucky and the Constitution of the United States. To this reply defendant demurred, but the Court overruled the demurrer. Subsequently, and after the Circuit Court of Appeals had decided in the injunction suit that the statute in question did apply to the pending condemnation case, and that it was constitutional, the District Court set aside its order *overruling* the demurrer to plaintiff's reply and *sustained* the demurrer, and plaintiff having declined to plead further, the Court dismissed the proceeding.

As it will be necessary, in course of our argument, to refer to the terms of the original statute giving to a Telegraph Company the power to condemn a railroad right of way, we print that statute in an appendix to this brief. It is an Act of the Legislature of Kentucky which was approved March 19, 1898 (2 Carroll's Kentucky Statutes, §4679c). And we shall presently quote in full the brief statute of

March 14, 1916, which withdraws any such power of condemnation and *expressly forbids* the taking of any part of a railroad right of way by a Telegraph Company; this being the statute, the construction and validity of which we are now called upon to consider.

I.

Construction of Act of March 14, 1916.

The language of the Act of March 14, 1916, including the title thereof, is as follows:

> "AN ACT to protect Railroad Companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof for other purposes.
>
> "Be it enacted by the General Assembly of the Commonwealth of Kentucky:
>
> "§1. That no part of the right of way of any railroad company, or any interest or easement therein, shall be taken by any condemnation proceedings, or without the consent of such railroad company, for the use or occupancy of any part of such right of way, on, over, and along such right of way longitudinally, by any telegraph, telephone, electric light, power, or other wire company, with its poles, cables, wires, conduits, or other fixtures; provided, that nothing in this section shall be construed as preventing any such wire company from obtaining the right to cross the right of way of a railroad company, under existing laws in such manner as not to interfere with the ordinary use or ordinary travel and traffic of such railroad company's railroad.

"§2. That all acts and parts of acts in conflict with this act be and the same are hereby repealed" (Rec. 26). (3 Carroll's Kentucky Statutes, §840 a; Ky. Session Acts 1916, Chapter 15, page 69.)

The words here used do not seem susceptible of any doubt as to their meaning. In the first place the title of the Act indicates that it is an Act forbidding the condemnation of railroad rights of way for other purposes. Then the body of the Act, by its first section, in plain terms, provides that *no part of a railroad right of way shall be taken by any condemnation proceedings, by any telegraph or telephone company.* And finally the second section of the Act *repeals all acts and parts of acts in conflict with it.* Beyond question the terms of this Act forbid the condemnation of a railroad right of way by a telegraph company; and as the plaintiff in the present litigation is a telegraph company, and is seeking to take parts of the railroad right of way by condemnation proceedings, the present proceeding comes within the prohibitory terms of the Act.

Counsel for plaintiff Telegraph Company, however, refer to §465 of the Kentucky Statutes, and contend that it prevents the application of the Act just quoted to a *condemnation proceeding pending at the time the Act was passed.* The language of §465 is as follows:

"No new law shall be construed to repeal a former law as to any offense committed against

> the former law, nor as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect" (Ky. Statutes, §465).

We submit that this statute has no application to the situation under consideration. We sometimes find in statutes of this general nature, referred to ordinarily as "reservation statutes," a provision that *no pending proceeding* shall be affected by any new law, or by any repeal of a former law, unless the later law shall expressly so provide. But it will be observed that the Kentucky Statute (§465) contains no such language. There is no reference whatever in it to *pending proceedings.* If, for example, a party had been guilty of what is declared by an existing statute to be a public offense and had incurred a penalty under that statute, and if subsequently that statute should be repealed, the provisions of this §465 would continue the existing penalty which had been incurred *just as well if there had been no indictment found as it would if there had been an indict-*

ment found prior to the passage of the new Act. If two people had been guilty of the same offense under an existing statute, and one had been indicted and the other had not been indicted, at the time the Act was repealed, the saving statute contained in Section 465 would be just as applicable to one of these parties as to the other. In other words—and this is the point we are seeking to make plain—*the matter of the pendency or non-pendency of judicial proceedings has nothing whatever to do with the question of the application, or non-application, of Section 465*—it makes no reference to such proceedings. Therefore, whenever a new law is passed and it is claimed that the same has some effect on a pre-existing law, the question just simply is, has any penalty been incurred, or any right accrued, or claim arisen under the old law? *And this question will be answered just the same way, whether a judicial proceeding has previously been instituted, or not.*

We think the words of this Court in *Railroad Co.* v. *Grant,* 98 U. S. 398, are very applicable in this immediate connection. Under a statute giving the Supreme Court jurisdiction of writs of error to the Supreme Court of the District of Columbia, where the amount in controversy exceeded $1,000.00, such a writ of error was sued out on December 6, 1875. By an Act approved February 25, 1879, the jurisdiction of the Supreme Court was limited to cases where the amount in controversy exceeded $2,500.00. Thereupon the Supreme Court dismissed the writ of

error previously sued out. It first laid down the following general proposition:

> "It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law." (Citing authority—p. 401.)

And the Court then takes up the question as to whether or not any intent was shown by Congress to save "pending cases." And on that subject it said:

> "It is claimed, however, that, taking the whole of the Act of 1879 together, the intention of Congress not to interfere with our jurisdiction in *pending cases* is manifest. There is certainly nothing in the Act which in express terms indicates any such intention. Usually where a limited repeal only is intended, it is so expressly declared. Thus, in the Act of 1875 (18 Stat. 316), raising the jurisdictional amount in cases brought here for review from the Circuit Courts, it was expressly provided that it should apply only to judgments thereafter rendered; and in the Act of 1874 (*Id.*, 27), regulating appeals to this Court from the Supreme Courts of the Territories, the phrase is, 'that this Act *shall not apply to cases now pending* in the Supreme Court of the United States where the record has already been filed.' Indeed, so common is it, when a limited repeal only is intended, to insert some clause to that express effect in the repealing Act, that if nothing of the kind is found, the presumption is always strong against continuing the old law in force for any purpose. We think it will not be claimed that an appeal may *now* be taken or a writ of error sued out upon a decree or a judgment rendered before

the Act of 1879 took effect, if the matter in dispute is not more than $2,500; but it seems to us there is just as much authority for *bringing up new cases* under the old law as for *hearing old ones. There is nothing in the statute which indicates any intention to make a difference between suits begun and those not begun.* If, as is contended, the object of Congress was to raise our jurisdictional amount because of the increase of the judicial force in the District, we see no good reason why those who had *commenced* their proceedings for review of old judgments should be entitled to more consideration than *those who had not.* No declaration of any such object on the part of Congress is found in the law; and when, if it had been the intention to confine the operation of what was done to judgments thereafter rendered or to cases not pending, *it would have been so easy to have said so,* we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed" (p. 402).

The case just cited seems to us very significant and illustrative. A certain judgment had been entered. Under the existing law the party against whom the judgment went had a right to writ of error, so as to have his case reviewed by the Supreme Court. He had sued out the writ of error and it had been pending several years when a statute was passed, raising the amount necessary to the jurisdiction of the Supreme Court to an amount exceeding that involved in this case. The new statute made no distinction based on the pendency or non-pendency of a writ of error in any particular case, and the court com-

ments upon the fact that if Congress had intended to make such a distinction and to provide that the statute should have no effect on pending cases, as it had frequently done in passing other statutes, this would have been very easy to say—so easy in fact that the absence of such expression necessarily attracted attention.

So with the statute we are now considering in the case at bar. It is very common in statutes of this same general character in other States to provide that the repeal of a statute *shall not affect pending cases,* brought pursuant to the pre-existing statute. And it would have been so easy in enacting Section 465 of the Kentucky Statutes, simply to have provided that the new law should not be construed to affect any pending proceeding begun under the pre-existing law, if such had been the intention of the Legislature. We find such statutes in many of the States. *And yet our statute contains no such language.*

Speaking on this subject the Circuit Court of Appeals in the injunction case said:

> "It (Section 465) does not say that no new law shall be construed to repeal another so as to affect any proceeding pending, but speaks only with reference to its effect upon any 'right accrued or claim arising under the former law' or 'any right accrued or claim arising before the new law takes effect.' Those 'rights' or 'claims' which are thus exempted might or might not be involved in pending judicial proceedings; that

would be as it happened; but the exemption would be the same in either case" (Rec. 203; 268 Fed. 7).

And, as said further by the Circuit Court of Appeals in a note to its opinion (Rec. 202, note 3; 268 Fed. 7, note 3) this question is settled beyond controversy by the decision of the Court of Appeals of Kentucky in *Pannell* v. *Louisville Tobacco Warehouse Co.,* 113 Ky. 630, which involved a repealing statute, and where counsel relied on Section 465 to save *a pending law suit,* but in which the Court of Appeals held that the repealing statute there involved—and which was almost identical in form with the one involved in the case at bar—was so clear and emphatic in its terms that there was no room for construction, and therefore no room for the application of Section 465, which is a mere section of the statute on "Construction of Statutes."

We ask the Court's very careful attention to the language of the statute involved in the Pannell case and the language of the statute involved in the present case, and a comparison between the two. We are wholly unable to perceive any difference between the two statutes so far as the point now under consideration is concerned. In the Pannell case the statute which was in force at the time the suit was brought provided that a warehouseman in settling with a shipper of tobacco should account to him for the net weight of the tobacco, ascertained in a certain way; and that, if he should fail to do so, the warehouseman should be liable to the party aggrieved in the

sum of not less than twenty-five dollars nor more than one hundred dollars for each violation of the statute. Pannell was a seller of tobacco who claimed the statute had been violated in his case and that the warehouseman had incurred the penalties which he was entitled to recover, and accordingly he brought his suit. During the pendency of the action the Legislature passed a statute containing two brief sections, in the following language:

> "(1) That an act entitled 'An Act to regulate the sale of leaf tobacco in the Commonwealth,' approved April 5, 1892, be and the same is hereby repealed.
>
> "(2) *That no penalty provided in said act shall hereafter be recoverable in any court of this Commonwealth.*"

It will be observed that the repealing statute in that case *said nothing about pending proceedings.* It drew no distinction between the claimant of a penalty who had begun proceedings to recover it, and one who had not. It just simply said that no penalty provided in the act should thereafter be recoverable in any court of the Commonwealth. It might well have been argued, as counsel argue in the case at bar, and doubtless was argued in that case, that the statute should be construed in connection with Section 465 of the Kentucky Statutes, that the two should be read together, and that there should be excepted from the provisions of the repealing statute any claim to penalties which had actually been asserted *in a pro-*

ceeding pending at the time the repealing statute was passed. But the Court of Appeals said:

> "By the act in question the Legislature undertook to take out of the operation of Section 465 the repeal of the act in controversy, and we are unable to see that this is a violation of the constitutional provision" (page 639).

And if the words used in the statute involved in the Pannell case took it "out of the operation of Section 465," the words of the statute of 1916 do the same thing; because they are identically the same in substance and effect.

In the Pannell case the words of the statute referred to by the court, and which we repeat for convenience, were as follows:

> "That no penalty provided in said act shall hereafter be recoverable in any court of this Commonwealth";

and the words of the statute of 1916, which we are considering, are as follows:

> "That no part of the right of way of any railroad company, or any interest or easement therein, shall be taken by any condemnation proceedings, * * * by any telegraph, * * * company."

One statute says:

> "That no penalty provided in said act shall hereafter be recoverable in any court of this Commonwealth."

The other statute says:

> "No part of the right of way * * * shall be taken by any condemnation proceedings."

To make this plainer, if possible, we put the two statutes in parallel columns as follows:

Pannell Statute.	**Condemnation Statute.**
"No penalty provided in said Act shall hereafter be recoverable in any court of this Commonwealth."	"No part of the right of way of any railroad company * * * shall be taken by any condemnation proceedings * * * by any telegraph * * * company."

The Court of Appeals held in the Pannell case that the language used in the statute there involved took that Act "out of the operation of §465." And so it must be held that the language involved in the statute now under consideration has the same effect; *for it is identical in meaning on the point now under consideration.*

The Court will observe that the Act of 1916 is not merely a repealing Act, repealing the condemnation statute of 1898, nor is it primarily such repealing Act. It is a *prohibitory* Act. It contains a positive, absolute prohibition against the condemnation of a railroad right of way by a telegraph company. It is true the second section of the Act *repeals all* Acts or parts of Acts in conflict with the Act; but, so far as the present case at least is concerned, the effect

of the Act of 1916 would have been precisely the same if the second section, to wit, the repealing section of the statute, had not been embraced in it at all. The first section is the main section of the Act, and that, as said before, contains an express prohibition against the condemnation of a railroad right of way by a telegraph company. And that is what the court and the plaintiff found confronting them in this case after the reversal of the former condemnation judgment, and when the case was returned to the District Court. There was then no judgment of condemnation, and the statute forbade the Court to enter one. This statute forbids the court to enter a judgment of condemnation condemning a railroad right of way at the instance of a telegraph company. For the court to enter such judgment now would be contrary to and in violation of law. And in this connection it must be remembered that the power of condemnation is the State's power, a power possessed for the benefit of the public. It is true that, for convenience, it heretofore granted that power to an agent, the Telegraph corporation, but still to be exercised for the benefit of the public. And now the State has determined that it is not for the benefit of the public that a railroad right of way should be taken by a telegraph company. And accordingly the State has prohibited it. Its public policy has been changed in this respect.

II.

Constitutionality of Act of March 14, 1916, Plaintiff's Claim of Vested Right.

It is said, however, that a right to the property sought to be condemned *had vested* in the Telegraph Company at the time the Act of March 14, 1916 was passed, and therefore it could not be constitutionally deprived of this property, even if the State tried to do so.

We emphatically deny that any right to the property sought to be condemned had vested in the Telegraph Company at the time the Act of March 14, 1916 was passed.

It is true a judgment of condemnation had been entered, calling for the payment of a nominal amount of damages, and that plaintiff, without ever even tendering the amount to defendant, had hurried to the Court House and hastily paid the money into Court, under the circumstances heretofore explained. But that judgment was afterwards *reversed and entirely set aside* by the Circuit Court of Appeals—not reversed *in part,* and affirmed in part, but reversed *in toto.* As heretofore stated, defendant on the return of the case to that Court sought to have the Court enter an order expressly setting aside both the *Court's finding* on the question of necessity and interference, and the *jury's verdict.* The District Court refused to do this on the ground that such an order would be "superfluous." And when defendant asked the Circuit Court of Appeals for a rule

against the Judge to compel him to enter such order, that Court refused the rule on the ground that the necessary meaning and effect of its own judgment of reversal was "to *vacate* not only the judgment, but also any finding or verdict upon which the same may be based, and to leave the action for new trial *as if no finding or verdict had been made.*" (Rec. 154.)

Plaintiff made no effort to get the Circuit Court of Appeals to modify its judgment in any particular. It let it stand, a sweeping unqualified reversal of the condemnation judgment. And it is perfectly manifest from subsequent events that it had no thought at that time that it was entitled to have any such modification or reservation. That theory developed in the mind of plaintiff's counsel long afterwards, and was first announced in their "Supplemental petition for rehearing" in the Circuit Court of Appeals *in the equity case* some four years later.

It is not necessary to refer to the **Act of March 14, 1916,** to take away any right that may have been given *to the Telegraph Company by the judgment of condemnation. Whatever rights that* **judgment** *gave were taken away by its being subsequently* **reversed and set aside.**

It is true that the judgment of 1916 entered in the District Court "adjudged that the petitioner is to have the right perpetually to construct, maintain and operate its lines of telegraph * * * over, upon and along said right of way above described," and further adjudged "that upon payment of the

above award * * * the petitioner, the Western Union Telegraph Company, may continue in the occupancy of said property" (Rec. 142, 143). But all that was afterwards *set aside,* without qualification or reservation, by a Superior Court, and the case sent back to the Court, which had entered it, to proceed "as if no finding or verdict had been made."

It therefore seems to us too clear for further argument that, irrespective of any effect of the legislative Act under consideration, the condemnation judgment of February, 1916, and any rights it gave were completely swept away by its subsequent reversal in 1918. And, as said before, when plaintiff, on the return of the case to the District Court, sought to proceed further in the exercise of the power of condemnation, and to endeavor to get another judgment of condemnation, it was met by the insuperable obstacle that its power to condemn had been withdrawn by the State which gave it.

That, in the absence of a reservation clause to the contrary, the repeal of a statute giving the right to exercise a power, or imposing a penalty and giving the right to recover it, whether by prosecution or action, cuts away the foundation of any suit or prosecution in the exercise of the power or to recover the penalty, even though the repeal comes after judgment, *but pending an appeal* (in which term we include writ of error), is established by the authorities without dissent, so far as we know.

Thus in *Western Union Tel. Co.* v. *Smith*, 95 Ga. 569, 23 S. E. Rep. 899, the syllabus, *prepared by the Court*, is as follows:

> "The plaintiff below obtained a verdict and judgment against the defendant under the acts imposing penalties upon telegraph companies. The latter moved for a new trial, and the motion was overruled December 11, 1894. On the 17th of that month these acts were repealed generally, and on the 24th of that month a bill of exceptions, assigning error in the overruling of the motion for a new trial, was sued out by the defendant. *Held*, that the judgment of the court below must be set aside, *because, at the time the repealing act was passed, the defendant still had a pending legal right of exception, and therefore the judgment below was not absolutely final, nor the litigation between the parties necessarily at an end.* Accordingly the plaintiff was not, when the repealing act was passed, absolutely entitled to an enforcement of his judgment, and *the case must be dealt with in this court as one which was pending when the repeal took place.*"

It will be observed in the case just cited that at the time of the repeal the judgment had not in fact been reversed, nor the bill of exceptions even filed, but proceedings were simply *in process to perfect an appeal* to obtain such reversal.

In *Taylor* v. *Strayer*, 167 Ind. 23, 78 N. E. 236, there was a proceeding for the establishment of a ditch. There was at one time an order establishing it; but that order was set aside on appeal. The statute under which the proceeding was had was repealed, but contained a saving clause, which is quoted

in the opinion about to be mentioned. The question was as to the effect of this saving clause on the case, and the court said:

> "This proceeding was accordingly terminated with the repeal of the statute under which it was instituted unless it falls within the saving provisions of Section 14 above set out. It is provided that the repeal 'shall not affect any pending proceeding in which a ditch *has been ordered established!* * * * It is insisted by appellees' counsel that the proposed ditch having been ordered established by the Board of Commissioners of Noble County comes within the first of said saving clauses. We can not agree with this contention. An order or judgment which has been vacated by an appeal is in legal contemplation no order, and the statute without doubt means that only such proceedings shall be saved under this clause as have proceeded to a final order or judgment for the establishment of the ditch, and in which nothing remains but the execution of such judgment. * * * A final judgment recovered in the court vests the owner thereof with such interests as can not be arbitrarily taken away, and it was entirely appropriate for the Legislature to disclaim any intention to disturb such rights, and to remove all questions as to the rights to proceed with the construction of ditches so established and the collection of assessments made therefor. It is shown by the record that an appeal was properly taken from the order of the Board of Commissioners establishing the ditch in controversy, to the Noble Circuit Court. This appeal effectually vacated the judgment of the Board of Commissioners" (pp. 237, 238).

In *Mahoney* v. *State,* 5 Wyo. 520, 63 Am. St. Rep. 64, 42 Pac. 13, a criminal statute, under which a conviction had been had, was repealed pending an appeal from the judgment of conviction; and under the circumstances the Appellate Court directed the proceedings to be dismissed, saying:

> "If the statute is repealed before the final action of the Appellate Court, it will prevent an affirmance of conviction and the prosecution must be dismissed or the judgment reversed" (p. 14).

In *Pensacola & A. R. Co.* v. *State,* 45 Fla. 86, 110 Am. St. Rep. 67, 33 Sou. 985, the court thus stated the rule as expressed in the second paragraph of the syllabus prepared by the court, to wit:

> "An action can not be considered as concluded while an appeal therein is pending before an appellate court having jurisdiction to review it."

And in fact this Court has recognized this same principle. Thus in *Gwin* v. *United States,* 184 U. S. 669, after referring to certain authorities, the court said:

> "Similar cases are by no means infrequent in this court. Thus in Yeaton v. United States, 5 Cranch, 281, it was held that if the law, under which a sentence of forfeiture was inflicted, expired or was absolutely repealed after an appeal and before sentence by the appellate court, the sentence must be reversed" (p. 675).

Manifestly, therefore, the fact that there was at one time a judgment of condemnation in this case, which judgment, however, has been vacated by proceeding on writ of error, is of no materiality, because the case now stands *just as if there had never been such a judgment.*

Condemnation Proceedings in Kentucky. . .

Counsel for the Telegraph Company, however, claim to have discovered that what we have said as to the effect of the reversal of a common-law judgment is not true of a *judgment of condemnation* in Kentucky, when followed by a payment of the award to defendant, or by a tender to him and payment into Court, even though he may be resisting to the uttermost the effort to take his property at any price. They contend that by the law of Kentucky, if a condemnor can once get a verdict of a jury as to the amount of damage, whether acting on its own judgment or under a peremptory direction by the Court, and no matter how grossly inadequate it may be, and no matter how flagrantly erroneous the proceedings may have been, and can get a judgment of condemnation thereon, he can hasten to the landowner and tender him the amount of the award, and if he refuses it, pay it into Court, and take possession of the land, and that thereupon *the title vests in the condemnor, eo instanti and irrevocably,* and that although the landowner may get the judgment set aside

on motion for new trial or upon appeal, yet his property is gone forever, both title and right of possession, and that thereafter he simply has a law suit on his hands to collect the value of it, although from the beginning he has been fighting to hold on to his property by every means known to him.

There is no such law in Kentucky, no statute to that effect, and no decision to that effect.

And furthermore, even if it were possible in Kentucky for an Appellate Court to reverse and set aside only so much of a judgment of condemnation as fixes the amount of damage, and to reserve and preserve so much of the judgment as gives to the condemnor the right to the property, THAT WAS NOT DONE IN THIS CASE. The condemnation judgment was reversed absolutely, and without reservation.

But putting aside the manifest fact just mentioned, we turn to a consideration of the statutes and decisions in Kentucky on the subject of the exercise of the right of eminent domain.

There is no general statute in Kentucky regulating all condemnation proceedings. There are separate statutes regulating proceedings for condemnation for different public purposes. The statute giving the power of condemnation to Telegraph Companies, and regulating the proceedings, was passed March 19, 1898 (Ky. Stats. 4679c, printed in full in the Appendix to this brief). Until that time no telegraph company had ever had power of condemnation in Kentucky. And this present case, so far as we

have been able to find, *is the only case in which that statute was ever sought to be used,* except one unimportant case which never found its way to the Court of Appeals, and in which the telegraph company, after trying the case out in the County Court, declined to take the property therein involved.

The argument of counsel for the Telegraph Company in the present case is based almost entirely on the language of the *Railroad* Condemnation Statute (the language of which is very different from the Telegraph Statute). And the cases referred to are cases arising under the Railroad Statute. Though there is nothing in any of these cases, which states or lends support to the startling proposition now asserted by counsel in this case. But as counsel's argument is so largely based on the Railroad Statute and cases arising out of it, we will consider it. It is found in Kentucky Statutes, Sections 835-840, and for convenience, we print the whole of it in the Appendix to this brief.

It will be observed from a reading of that statute (Sec. 839) that on appeal from the County Court to the Circuit Court, the appeal is tried *de novo.* A trial is had, evidence heard, a verdict rendered, and judgment entered in the County Court. And, according to theory of counsel for the Telegraph Company, *title passes,* if the condemnor chooses to pay or tender the amount of the verdict in the County Court to the defendant. Their only reason for so claiming is that the statute says that under

such condition the condemnor may "take possession." Yet on appeal to the Circuit Court the trial is *de novo.* Defendant may deny that plaintiff has the power of condemnation (Calor Oil etc. Co. v. Franzell, 128 Ky. 715, 723), or he may deny that the property is "necessary" for plaintiff's use, or may deny that plaintiff has made an effort and has been unable to contract with the owner, which is a condition precedent to the right to institute condemnation proceedings (Portland Turnpike v. Bobb, 88 Ky. 226). And the whole matter is tried *de novo* in the Circuit Court. And, said the Court of Appeals in Calor Oil Co. v. Franzell, just mentioned, in speaking of the trial in the Circuit Court: "The case came on for trial *de novo,* and *the whole controversy* was to be tried out there. That is what a trial *de novo* means. * * * All the language of the section (839) indicates an intention that, upon appeal to the Circuit Court, the *whole case* is to be there tried and settled, subject *of course to a right of appeal to this Court"* (128 Ky. p. 723). And yet, according to the claim of the Telegraph Company, it is not "the whole controversy" or "the whole case" that is to be tried on the appeal to the Circuit Court, or afterwards to the Court of Appeals. Under the statute plaintiff may tender to the landowner the amount of the *County Court* judgment and immediately *take possession;* and, according to the theory of counsel, *the title to the property thereupon immediately passes to the plaintiff with the possession,* and thereafter only a question of damages can be tried on appeal to

the Circuit Court or to the Court of Appeals—not "the whole controversy," not "the whole case," but only part of it, only the question as to damages. In other words, merely because *possession* is allowed by the statute to be taken after the verdict and judgment in the County Court, upon payment or tender of the amount fixed by that judgment, it is the theory of counsel that *title* thereby passes at the same time, and that the statute does not allow any appeal thereafter to any Court *except on the question of damages.*

The statute does not SAY *anything of this kind; and that it does not* MEAN IT *is manifest from the language of the case just cited* (Calor Oil Co. v. Franzell, 128 Ky. *supra*).

Counsel in their brief seem rather to slide over the provisions of the statute that possession may be taken upon tendering satisfaction of the *County Court* judgment, and treat it as if this right merely followed satisfaction of the *Circuit Court* judgment. But this is not what the statute says. It gives this right following the *County Court* judgment. And if the mere right to *take possession* indicates that *title* passes with the possession, and that thereafter only a question of damages is involved, then title can be thus acquired by tendering satisfaction of a mere County Court judgment, and the appeal both to the Circuit Court and thereafter to the Court of Appeals can involve only a question of damages; and the setting aside or displacement of the County Court judgment by the Circuit Court, or of the Circuit Court

judgment by the Court of Appeals, will have no effect on the *title* which passes irrevocably upon tender of payment and taking possession pursuant to the County Court judgment. Yet the Court of Appeals in *Shirley* v. *Southern Ry.*, 26 Ky. Law Rep. 360 (not officially reported), referred to by counsel for the Telegraph Company, says: "After the trial in the Circuit Court the judgment rendered therein *takes the place of the County Court judgment*" (p. 362). And the Court there cites Freeman on Judgments to the effect that the effect of an appeal and trial *de novo* in such a case "is to *vacate* and *set aside* the judgment of the inferior tribunal." In other words, counsel say title passes, and passes irrevocably, under a judgment which is "vacated" and "set aside" by a mere appeal from it, and the place of which is thereafter to be taken by the judgment of another Court.

And as the statute says no such thing, so the Court of Appeals has never said any such thing. One may readily see what would be the consequences of such a principle. It frequently happens—it has happened in Kentucky—that a new railroad corporation is formed, which is but little more than a paper corporation. It desires to build a railroad, and the way it does it is this: It makes a contract with a firm of contractors and agrees to turn over to them its stock and bonds, in consideration of which the contractors agree to pay all expenses of acquiring rights of way under the power of condemnation which the Railroad Company has, and then to build and equip the rail-

road and turn it over to the Railroad Company. In the meantime the Railroad Company executes a mortgage on all of its property then owned, or "thereafter to be acquired," and issues a large amount of bonds secured by this mortgage and turns them over to the contractors. The result of such an arrangement is that as fast as property is acquired in the name of the Railroad Company, it passes under the mortgage by virtue of the after-acquired property clause. According to the newly discovered theory of counsel for the Telegraph Company in the present case, if such a Railroad Company can succeed in the County Court in getting a verdict for a small amount of damages—possibly a mere nominal amount, as in this case—it can pay or tender these damages to the owner of the property and take possession; and thereupon instantly and irrevocably the title becomes vested in the Railroad Company. The owner may thereafter appeal to the Circuit Court, and on a trial before a jury in the Circuit Court he may get a verdict for many times the amount of damages assessed by the jury in the County Court. But how is he to get his money? The Constitution says his property shall not be taken from him until he is first paid for it; and a jury has now determined the amount to which he is entitled; but in the meantime, not only has the possession of his property been taken from him, but the title has been taken from him, and is vested in the Railroad Company. In other words, the owner has lost, and the Railroad Company has acquired,

not only the possession of, but title to, the property, and the owner has simply a claim, *a right to a personal judgment*, against the Railroad Company for the amount which the second jury has fixed by its verdict. The statute certainly gives him no lien either upon the specific property which the Railroad Company has theretofore acquired from him, nor upon the property of the Railroad Company in general. There is not a suggestion in the statute of the existence of such a lien; and *manifestly no such condition is contemplated.* If the owner should get out execution on his personal judgment and seek to have it levied, he would be met by the lien upon the property of the Railroad Company to secure its mortgage bonds. But whether or not he has a lien, and whether or not he could levy execution, he sees his property gone, both title and possession gone, and he has simply *a law suit* on his hands to collect his money.

We confidently submit that there is absolutely nothing, either in the Constitution or Statutes of Kentucky, or in the decisions of the Court of Appeals of Kentucky, which gives any support to a theory of law under which such a situation as that just suggested could be possible.

We think it will not be out of place to quote to this Court some of the language of the Court of Appeals of Kentucky, in which it has rigidly enforced the principle imbedded in the Constitution of the State that no man's property can be taken from him without the previous payment in money into his own

hands of just compensation therefor, unless, upon tender of the amount to him, he refuses to accept it. No manner of promise, or obligation, or security, not even the payment of the money into Court for him, is sufficient. And it matters not by whom the promise is made, or upon whom the obligation to pay him is rested, or what the security may be. The obligation may be the obligation of the State, or of some county or city of the State. The security may be absolutely, and beyond all possible question, abundant. Yet this is not sufficient. As said before, not even the payment of the money into Court will suffice, except where tender to the landowner himself has previously been made and refused. None of these expedients or supposed securities will, according to the Constitution of Kentucky, suffice in lieu of the payment of the actual money to the property owner before his property is taken from him. And the ground upon which all these decisions rest is that, *if a man's property is taken before he is paid for it, he may have to resort to a law suit to get his compensation; and that there is more or less uncertain about any law suit.*

In 1888 this whole subject came before the Court of Appeals of Kentucky in the case of *Covington Short-Route, etc., Ry. Co.* v. *Piel,* 87 Ky. 267, under the Railroad Condemnation Statute as it then existed. A report of a Commission assessing the damages to the defendant had been filed in the County Court, but on exceptions a trial had been had and a

verdict awarded for $8,000.00. The case was then appealed to the Circuit Court, where a verdict was awarded for $8,250.00. Thereupon the Railway Company, in conformity with the then existing statute, gave a bond with security for double the amount of the award, conditioned to perform the judgment of the County Court or of any Court to which the case might be appealed; and then demanded possession. The question before the Court was as to the validity of the statute authorizing this procedure. It was pointed out to the Court that in some old cases in Kentucky, such a procedure had been upheld in condemnation proceedings undertaken by a municipality of the State. The landowner insisted that the principle of those cases did not apply to the case of a railroad corporation. But the Court of Appeals, not stopping at any such distinction, simply held that the proposition was fundamentally unsound and the provisions unconstitutional, no matter who might be the condemnor. Speaking on that subject the Court said:

> "Whether or not this reason controlled the decisions of this court in the earlier cases is not now necessary to inquire, for it is manifest that a mere security in the bond of a corporation can not be regarded as *just compensation previously made the owner* within the spirit and meaning of the Bill of Rights. That the citizen would be more likely to receive compensation from the State out of an abundant treasury, and by reason of its power to enforce payment by exactions from its citizens in the form of taxation, than from a private corporation owning its corpora-

tion property, or the individual security given by it, will be readily conceded; but in what manner this protects the citizen who has been deprived of his property in his constitutional rights it is difficult to comprehend. The security may be more ample in the one case than in the other, and still his right of property has been destroyed in its appropriation to a public use, without just compensation previously made, and all that is left him, whether due by the municipality, county or corporation, is *the right, if a voluntary payment is not made at the end of the litigation, to take coercive measures for the recovery of the value of his property* to which he was clearly entitled from the municipality or the private corporation before either could use it for public purposes.

"Viewed in any aspect of the case, whether taken by the sovereign or by the corporation under sovereign authority, it is a destruction of the constitutional guaranty for the protection of private property to appropriate it, *without the consent of the owner,* to a public use without first making compensation to him in money for the value of the property of which he has been deprived. *We are aware that in the condemnation of private property for the construction of railroads, serious injury must often result to the public by a delay in the progress of the work until the question of compensation is determined by litigation. The necessity for an immediate entry in all such cases is apparent, still it could not have been intended by the framers of the Constitution that a mere security for payment should be deemed equivalent to payment in fact. That just compensation previously made authorized the corporation under legislative authority to take private property upon a credit by executing a bond,* PAYABLE AT THE END OF A LITIGATION,

> *is a doctrine that cannot be sanctioned by this Court. The language of the Bill of Rights does not admit of such a construction"* (p. 272).

The same principle was asserted and enforced in *Asher* v. *L. & N. Railroad Co.*, 87 Ky. 391.

Again the same question came before the Court in *Carrico* v. *Colvin*, 92 Ky. 342, in which a county was seeking to condemn land for a public road, and in which the Court again asserted the principle that even when the State itself, or a sub-division of the State, is the condemning party, and is the party whose promise is given to make payment, this does not alter the proposition that payment in money must in fact be made or tendered before the property can be taken, the Court saying:

> "Now a promise of compensation, however solemnly made, is not an actual compensation nor its equivalent. Is the judgment of the County Court awarding the appellee the value of the land taken anything more than that the county shall pay the amount of the judgment? We think not. The county authorities may refuse to make the levy or payment, and the appellant would be compelled to resort to legal proceedings to enforce the judgment which might be by another Court declared void, etc. So the judgment of the County Court fixing the amount of compensation and ordering its payment is not an actual payment in money nor equivalent to such payment" (p. 344).

And this same principle has been reiterated and applied in the very late case of *Bushart* v. *County of*

Fulton, 183 Ky. 471, involving a proceeding by a county to open a public road.

After the decisions in the foregoing cases (other than the last one, which is very late), the Railroad Statute was changed. The provision allowing the condemnor to take possession upon *giving a bond* in double the amount of the award was stricken out, and it was provided that the condemnor might take possession by *paying into Court* the amount of the award. And the validity of this provision came before the Court in the case of *Chicago, St. Louis, etc., Ry. Co.* v. *Sullivan,* 24 Ky. Law Rep. 860 (not officially reported). And the Court held that even the *payment into Court* of the amount of the damage fixed by the jury's verdict was not the equivalent of payment to the landowner himself, and was not sufficient to justify the taking possession of the property, although the statute expressly authorized such payment into Court. And many cases since have rigidly enforced this same constitutional principle.

In the case last mentioned the Sullivan case, it was insisted that the present Constitution, adopted since the decision in Covington Short-Route v. Piel, 87 Ky., *supra,* had changed the law. But the Court said, "No"; that while under the new Constitution security could be given for mere *damage* to property, yet when it was proposed to *"take"* property, the new Constitution made no change in the pre-existing law; and there could be no substitute for either the actual payment or actual tender of the money to the

property owner for property *taken,* and before it could be taken, a proposition reiterated in Bushart v. County of Fulton, 183 Ky. 471.

The purpose of making these long quotations and citations to this Court from the opinions of the Court of Appeals has been to show the Court how absolutely rigid and consistent the Court of Appeals of Kentucky has been in the enforcement of a principle which enables the property owner to hold on to his property until he is actually paid for it in money (unless he refuses the payment when tendered), and which protects him from what may be even a mere possibility of a loss, where, with his property gone, he is compelled to resort to any kind of judicial proceeding, with its attendant uncertainties and delays, in order to get his money.

Now it is true the Railroad Condemnation Statute of Kentucky (not the Telegraph Statute under which this proceeding was begun) makes provision for the *taking possession* of the property by the Railroad Company where a verdict is returned and judgment entered in the County Court, and where the Railroad Company (the condemnor) pays or tenders the amount of the judgment to the defendant landowner, and, in the event of tender and refusal, pays it into Court, even though an appeal be taken from the judgment by either party. But there is not a word in the statute, and there is not a word in any decision of the Court of Appeals, which indicates that such a proceeding *vests the title* to the property in

the Railroad Company, except possibly *where the landowner consents thereto.* So far from the Railroad Statute providing for the passage of title by such a proceeding, its language plainly indicates *exactly a contrary intent.* This statute manifestly contemplates that when a point is reached where the parties are satisfied, and where no further proceedings are to be had, the Court shall order a deed to be made to the Railroad Company passing the title to the property; but that, so long as proceedings are continuing, while the Railroad may, if it chooses so to do, pay the amount of the preliminary judgment in the County Court, or for that matter in the Circuit Court, and *take possession* and use the property *as if it had title,* yet the *title does not in fact pass* and vest in the Railroad Company until the conclusion of the litigation, when it is contemplated that a deed will be made. The section relevant to the particular matter we are considering is Section 839, which is as follows:

> "§ 839. Trial of Exceptions—Assessment of Damages—Appeal—When Company May Take Possession. When exceptions shall be filed by either party, the Court shall forthwith cause a jury to be impaneled to try the issues of fact made by the exceptions, and each juror shall be allowed one dollar per day for his services, to be taxed as cost. In assessing the damages the jury shall be governed by the rule prescribed in §836 of this law, and, upon the request of either party, may be sent by the Court, in charge of the Sheriff, to view the land or material. If suf-

ficient cause be not shown for setting aside the verdict, the Court shall render judgment in conformity thereto, and shall make such orders as may be proper for the *conveyance of the title* upon the payment of the damages assessed. *Either party may appeal to the Circuit Court, by executing bond as required in other cases, within thirty days, and the appeal shall be tried de novo,** upon the confirmation of the report of the commissioners by the County Court, or the assessment of damages by said Court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the *County Court* when the damages are assessed by said Court, and all cost adjudged to the owner, the Railroad Company shall be entitled to *take possession* of said land and material, and *use and control* the same for the purpose for which it was condemned *as fully as if the title had been conveyed to it.* But when an appeal shall be taken from the judgment of the County Court by the company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into Court the damages assessed and all costs. All money paid into Court under the provisions of this law shall be received by the Clerk of the Court and held subject to the order of the Court, for which he and his sureties on his official bond shall be responsible to the persons entitled thereto."

Thus, as said before, this Statute manifestly contemplates that the title to the property shall not pass until the conclusion of the litigation. And provision is made for having the title conveyed by a

*The statute is badly punctuated. A sentence should end with the words "de novo," and a new sentence should begin with the words, "Upon the confirmation," etc.

commissioner, or other person appointed by the Court; but, to avoid public inconvenience, the Railroad Company is given the privilege, *if it chooses to take the risk, of entering into possession and using the property,* pending the litigation, provided that after a jury has found a verdict, it pays or tenders to the owner of the property, or in the event of his refusal, pays into Court, the amount of the verdict, in which event, in the language of the statute, he is authorized to use it and control it "as fully *as if* the title had been conveyed to him," which language is a plain recognition of the fact that the title to the land does not, by such proceeding, pass to it; it being simply allowed to use it *as if it had title.*

There is nothing in any opinion of the Court of Appeals cited by counsel for the Telegraph Company, or with which we are familiar, which militates in the slightest degree against the views we have expressed, or which intimates that *title passes* to the Railroad Company under the Railroad Condemnation Statute *before the conclusion of the litigation.* And if the statute did so provide, it would be plainly unconstitutional.

The earliest case on this subject referred to by counsel is one heretofore mentioned, Chicago, St. Louis, etc., Ry. Co. v. Sullivan, 24 Ky. Law Rep. 860. The facts in that case briefly stated were that the Railroad Company instituted condemnation proceedings, whereupon there was a report by commissioners in the County Court, and then a verdict

by a jury in the County Court, fixing the amount of damage to which the owner was entitled at $3,000.00. Both parties appealed to the Circuit Court. The Railroad Company paid the money into Court and sought to take possession of the land. The property owner resisted, whereupon the Railroad Company brought suit to enjoin him from interference. The Circuit Court first granted and then dissolved the injunction, whereupon application was made to Judge Burnam, as a judge of the Court of Appeals, to reinstate the injunction. Under the Code of Practice of Kentucky this is an application over which only the single judge to which the application is made has jurisdiction; but it is a practice of the judges to call upon each other for advice in these matters, and it is said that was done in this case. However that may be, the ultimate result, the principle of law actually decided, and the only one that was involved or decided in the application, was the principle that *the payment of the money into Court was not the equivalent of payment or tender to the landowner,* and that, therefore, the Railroad Company did not have the right to take possession. And the motion to reinstate the injunction was overruled. Counsel for the Telegraph Company in the present case quote the following language of Judge Burnam, used by him after deciding the principle just mentioned, to wit:

> "But I entertain no doubt, however, that upon the payment or tender to the defendant

that the Railroad Company is entitled to the *immediate possession* of the land condemned *as fully as if the title had been conveyed to it,* even if the defendant elected to prosecute an appeal.

"The statute provides that either party may appeal to the Circuit Court by executing bond as required in other cases, within thirty days, and that the appeal shall be tried de novo. Under this statute the Railroad Company can prosecute an appeal to the Circuit Court for the purpose of reducing the amount of damages awarded to the defendant, notwithstanding previous payment, and the defendant is also given the right of appeal, notwithstanding he may have accepted the compensation awarded in the County Court proceedings * * * bonds being required to the end that the successful party in the trial de novo in the Circuit Court might be secured in the increase or decrease, as the case may be, of the judgment of the County Court."

No question of *title* was involved in that case at all.

Then let us take the next case, quite a later case, referred to by counsel, *Long Fork Ry. Co.* v. *Sizemore,* 184 Ky. 54. It is worth while to state the facts of this case. The commissioners in the County Court fixed the landowner's damages at $3,000.00. Both parties filed exceptions, and a jury in the County Court fixed the damages at $5,500.00. The Railway Company appealed from this to the Circuit Court, and having deposited the $5,500.00 with the Clerk of the Court, took possession of the land condemned. In the Circuit Court the jury fixed the damages at

$5,700.00 ($200 in excess of the County Court verdict), and thereupon a judgment was entered "directing the Master Commissioner *to convey to plaintiff the land condemned,* ordering the $5,500.00 deposited in Court by plaintiff to be paid to defendants and giving them a personal judgment against plaintiff for the remaining $200.00 and costs" (p. 55).

Neither side objected to the order directing the Commissioner to convey the title to the Railroad Company. The Court of Appeals itself expressly states this fact (p. 56). In other words, *both the Railroad Company and the landowner were willing to have the property then and there conveyed,* and we suppose this was in fact done. There is nothing to show to the contrary. The Court ordered it, and neither party objected. But, aside from questions as to competency of evidence, and as to the excessiveness of the verdict, the only objection urged by the defendant Railroad Company on the appeal was to that part of the judgment which gave the landowner a personal judgment against the Railroad Company for the $200.00 above the amount paid into Court. And the substance of what the Court of Appeals decides on this proposition is that, while it is true ordinarily that a corporation exercising the power of eminent domain may, even after judgment and before possession is taken, elect to abandon the land and not take it, yet when the Railroad Company, pending the proceedings, elects to pay a preliminary judgment and *takes possession* of the land, and *the*

landowner acquiesces in this, and by the consent or acquiescence of both parties a deed conveying the title to the Railroad Company is made, there is no reason why a personal judgment should not be given against the Railroad Company for the amount fixed by the last jury's verdict in excess of the amount theretofore paid into Court. *The foregoing are the facts of the case referred to, and the foregoing is all that case means or decides.* The Court, in speaking of the Railroad Company's right of election to take or not to take the property, says:

> "This right of election, however it may be in other jurisdictions, when once exercised, is, under the provisions of our Constitution and Statutes, binding upon the corporation *if consented to, expressly or impliedly, by the landowner*" (p. 55).

Counsel in their brief (page 44) say that where the Court here refers to the owner's consent, express or implied, the Court was referring to the owner's consent that the money be paid *into Court,* rather than to him. But manifestly this is *not* what the Court means, for it is not what it says. The Court is speaking of the condemnor's *election* to pay for the land and take possession. And the Court says if the condemnor does so elect and does take possession, this is binding upon him, *if consented to by the landowner* (as was true in the case then before the Court). Thus indicating beyond question that this did not bind the landowner *unless he consented to it.*

And from this it plainly follows that if the landowner does not thus consent he does not lose his property, except the temporary right of possession, and may afterwards demand the return of it, should the power of condemnation be withdrawn before finally consummated by the completion of the litigation, or should the condemnor fail to pay the amount fixed by the last and final judgment.

Again the Court, in the case under consideration, says:

> "Neither can it object to the personal judgment against it for the excess of the damages finally awarded over the deposit, because that was the very question the proceedings, *after the question of possession had been disposed of by the action and acquiescence of the parties*, submitted for adjudication. Neither party is objecting to that part of the judgment directing the Master to convey the land condemned to appellant, and after appellant has *forcibly taken from appellees the possession* of their land by this proceeding and *procured judgment for title* thereto as well, it would be a peculiarly unwarranted conclusion indeed that would deny to the Court having jurisdiction of the parties and the subject matter, the right to dispose of the whole litigation by making effective by its judgment the verdict of the jury on the very issue submitted to it. Hence there is no merit in the contention the Court erred in the personal judgment against appellant" (p. 57).

It may be worth while to note that the judgment in that case *did not give a lien* upon the property in question to secure the payment of the $200.00 over

and above the amount previously paid into Court. It simply gave a personal judgment for that amount. And the Railroad Company objected even to that, although it had taken possession of the land and procured a judgment directing the title to be conveyed to it, in which the landowner acquiesced. It is simply inconceivable to us that the Court could have done otherwise than give a judgment, under those facts, for the $200.00 in question.

So far from this case deciding or intimating that *where the landowner objects and resists,* the title nevertheless passes to the condemnor irrevocably upon the payment of the first verdict that may be secured, and remains forever fixed, though that verdict be set aside on motion or appeal, the express language and the spirit of the entire opinion are just to the contrary.

Counsel say the case of *Madisonville, etc., Co.* v. *Ross,* 126 Ky. 138, is illustrative of the doctrine "that title vests upon payment of compensation." But there is not one word in the opinion in that case on the subject of the vesting of title. It was a case that arose under the Railroad Condemnation Statute, to which we have already referred and which we have in fact quoted, and the only question involved was the right of the Railroad Company to *take possession* pending the litigation, upon payment of the amount fixed by the jury's award. The way in which that question arose was that this payment was made and possession taken pending the appeal to the Court

of Appeals; and the landowner moved to dismiss the appeal on this ground, on the theory that the appeal had been thereby abandoned. The Court of Appeals simply said that the statute authorized it, and, therefore, there was no abandonment of the appeal.

Counsel refer to and rely upon what is a manifest dictum in the old case of *Treacy* v. *Elizabethtown, Etc., R. Co.*, 85 Ky. 270 (the opinions on previous appeals in the same case being reported in 78 Ky. 309 and 80 Ky. 259). An old special railroad charter, enacted in 1869, provided a special method of condemnation of land. It provided for an inquest of damages by a sheriff's jury, which was to "meet on the land" and hold "an inquest of damages." The oath of the jury was that it would "justly and impartially fix the damages." The sheriff was required to return the verdict to the Clerk of the Circuit Court, which was either to confirm the same or set it aside and direct another inquisition. There was no provision whatever for trying before this sheriff's jury any question other than the question of damages.

In the case under consideration, the sheriff summoned a jury, which was sworn in accordance with the statute. The landowner filed an answer with the sheriff (a proceeding for which the statute furnished no authority), in which he denied that the land was necessary for the company's use. No attention was paid to this on the trial before the jury, and it seems manifest to us that the jury had no right to try such a question—they were not sworn to try any such ques

tion. And the answer of the landowner was entirely disregarded. The jury found their verdict, fixing the amount of the damages, and this was returned by the sheriff to the Clerk of the Circuit Court. Motion was made in the Circuit Court to approve the verdict, which it did, no attention being paid to the answer of the landowner, insisting that there was no necessity for the taking of the land.

On appeal to the Court of Appeals, it held that there were two essential prerequisites to the power to condemn, to wit, (1) that the taking be for a public use and (2) that the land be necessary for that use. And as these questions had not been tried or determined at all, the judgment of condemnation was reversed (80 Ky. 259).

Before the case got back to the Circuit Court the Legislature had passed a general railroad condemnation statute, which in effect repealed all special condemnation statutes contained in charters. And the question arose as to whether the trial of the Treacy case should be under the old charter or under the new statute. The Circuit Court held it should be under the old charter, and so held the new trial. On appeal to the Court of Appeals that Court held that the trial should have been under the new statute; but in doing so it stated, in substance, that *if* the Railroad Company's proceedings "in the county" *had been* "a sufficient compliance with the conditions precedent to its right to acquire right or title to the land," the Court should have retried the case under the charter,

because the Railroad Company, having acquired a right to the property, the Legislature could not thereafter repeal the charter remedy. It is perfectly manifest that this was a pure dictum by the Court. It was not called upon to consider or decide whether or not, if certain things had been done, which had not been done, the Railroad Company would have acquired a right to the property. Those things were not done; and all the Court in fact decided was that upon the return of the case from the Court of Appeals a new trial should be had according to the provisions of the new statute as to the mode of procedure.

If there had been an effort by the sheriff's jury in the county to decide the question of necessity, or if the Circuit Court had undertaken to hear evidence upon and decide that question after the return of the verdict by the sheriff's jury, and if the Court of Appeals had then been faced with the necessity of determining whether or not title had passed to the property, it might have found difficulties in its way, which, in the case actually presented to it, it was not necessary to meet, because the facts, as they existed, did not require a decision of this question. The Court would then have found it necessary to consider with great care the provisions of the special charter, and the provisions of the Constitution of the State, and to determine their effect upon the question of title. But as the facts which would have necessitated such a consideration and determination did not exist,

the Court was not called upon to consider them. All it had to do to dispose of the case was to say that, whatever might be true, if the question of necessity had been tried and determined, yet this had not been done, and that certainly no right had vested in the Railroad Company, under the facts as they existed, and the case should have been tried under the new statute of procedure.

The language of this Court in Carroll v. Carroll's Lessees, 16 How. 275, is strikingly applicable upon the question now under consideration. It is this:

> "If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined, to fix the rights of the parties, and decide to whom the property in contestation belongs.
>
> "And, therefore, this Court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

It was manifestly not necessary for the Court to decide in the Treacy case that title *would have passed*, if conditions had been found to exist, *which were not found*.

There is nothing new or strange about this idea of *title* and right of *possession* being separate and

distinct things, *acquired at separate and distinct times,* in condemnation proceedings. This is very clearly shown by this Court in the case of *Cherokee Nation* v. *Kansas Railway Co.,* 135 U. S. 641, 659. The statute involved in that case allowed the condemnor to take possession of the property following a report by Commissioners fixing the compensation, on condition that the condemnor deposit in Court double the amount fixed in the Commissioners' award. The property owner then had the right to except to the award and appeal to the Court where the matter should be tried *de novo.* It was objected that this provision violated the Constitution of the United States. In answering that objection, the Court said:

> "This question would be more embarrassing than it is, if, by the terms of the act of Congress, the *title* to the property appropriated *passed from the owner to the defendant,* when the latter —having made the required deposit in Court— is authorized to *enter upon the land, pending the appeal,* and to proceed in the construction of its road. But, clearly, the title does not pass until compensation is actually made to the owner" (p. 659).

Then again, after quoting from the case of *Kennedy* v. *Indianapolis,* 103 U. S. 599, the Court said:

> "In the case now before us, the property in respect to which the referees made the award will be *conditionally appropriated* for the public use when the defendant makes a deposit in Court of double the amount of such award, and it only remains to fix the just compensation to be made to the owner. But *the title has not passed, and will not pass,* until the plaintiff receives the com-

> pensation *ultimately* fixed by the trial *de novo* provided for in the statute. So that, if the result of that trial should be a judgment in its favor in excess of the amount paid into Court, the defendant must pay off the judgment *before it can acquire the title* to the property entered upon, and failing to pay it within a reasonable time after the compensation is *finally* determined, *it will become a trespasser,* and liable to be proceeded against as such" (p. 660).

The Court does not state whether the defendant had or had not any further right of appeal or writ of error after the trial *de novo* above referred to. But it is perfectly manifest from the opinion that what the Court means is that title will not pass until the amount to which the landowner is "ultimately" found to be entitled is paid, although possession of the property may be taken pending the proceedings. And this is manifestly the meaning of the opinion in *Kennedy* v. *Indianapolis,* 103 U. S. 599, to which the Court refers. And when the statute of the State gives to the owner of property the *right of appeal,* whether it be from commissioners to a court, or from a County Court to a Circuit Court, or from a Circuit Court to a Court of Appeals, the amount to which he is "ultimately" entitled is that amount which is ultimately and finally determined upon at the end of the litigation. *Otherwise the right of appeal would be of little value.* The just compensation referred to in the Constitution, which must be paid before a man's property can be taken from him, is not the amount of some prelim-

inary award, whether by commissioners or a jury, but the amount *finally* fixed at the end of the procedure which the law provides for that purpose. And until that amount is paid to the owner the title to his property does not pass, although possession may have previously been taken. Consequently, if the power of condemnation is withdrawn before the final determination of the cause, and therefore before title has passed and the rights of the condemnor become vested, the power to acquire the property is lost.

Speaking on this subject, and after referring to the position of the Telegraph Company and the Kentucky cases cited by it, upon which we have commented, the Circuit Court of Appeals in responding to the Supplemental petition for rehearing in the equity case said:

> "We find nothing in any of these decisions which necessarily reaches beyond a *present and perhaps contingent possession,* or which would deny the right of the owner to have possession returned to him, if the damages as finally fixed were not paid—a protection which seemingly would be necessary under the Kentucky Constitution—or if the right to condemn should finally be denied" (268 Fed. 14; Present Rec. 210).

In conclusion, as to this Railroad Condemnation Statute, there is not a word in it, or in any case which has arisen under it, which authorizes the divesting of the *landowner's title* before he is paid that which is *finally determined* to be his just compensation; although provision is made in that statute for a *taking of possession* pending appellate proceedings, as here-

tofore explained. *But that is not the statute we are dealing with in this case.*

TELEGRAPH CONDEMNATION STATUTE.

What we have said thus far has related to the Railroad Condemnation Statute in Kentucky; and this, together with the cases arising under it, is that to which counsel for the Telegraph Company have devoted most of their brief. We have seen that this Railroad Statute contains express provisions authorizing a condemning Railroad Company to *take possession,* pending an appeal, *upon the payment of the amount fixed by the jury,* though it manifestly does not contemplate that *title* shall thereby pass (as the language of the Statute clearly shows). *But there is no such provision in the Telegraph Condemnation Statute.* There is nothing in the Telegraph Statute which authorizes the Telegraph Company, *upon the payment of the amount of the jury's award,* to take possession of the property *pending an appeal.* The only clause or language in the Telegraph Statute which bears on this subject is that found in §8, which is as follows:

> "8. That either party shall have the right to appeal from said judgment to the Court of Appeals within thirty days after the rendition of said judgment, upon entering into bond with sureties, to be approved by the Court or Judge in vacation in the sum of $200.00, conditioned to pay all costs that may be adjudged against it if said cause shall be affirmed. But an appeal by

> the defendant shall not operate as a supersedeas, provided *the Telegraph Company shall enter into bond with sureties, to be approved by the Court in* DOUBLE THE AMOUNT OF THE AWARD, payable to the defendant in case said cause shall be reversed, *and upon the execution of such bond may construct its telegraph line* upon the right of way as prayed for in its petition." (2 Ky. Stats. Sec. 4679c, Subsec. 8).

The language just quoted from §8 is the only language in the Telegraph Statute that relates to the question of *taking possession* by the Telegraph Company *while the litigation is still pending.*

Section 9 provides for paying the award into Court where there are mortgages upon the property; but this manifestly refers to the conclusion of the litigation. It simply provides how the judgment shall be paid at the end. It has no bearing on the rights of the parties pending an appeal, and makes no reference to either title or possession of the property or the right of appeal.

Counsel say Section 7, in setting forth the form of judgment to be entered, prescribes that upon paying the award the Telegraph Company may enter upon and appropriate the land. But that section is merely *prescribing the form of a final judgment,* just as a statute regulating proceedings in an action of ejectment might prescribe that upon the return of a verdict for plaintiff a judgment should be entered giving plaintiff the right to possession of the land, and awarding a writ of possession. But that has nothing

to do with the rights of the parties pending an appeal, or with the question of what shall be their rights in event of a reversal of the judgment. Take the illustration of the suit in ejectment. Suppose the statute did say that the final judgment should in terms adjudge that plaintiff is the owner and entitled to immediate possession of the land and should award a writ of possession. And suppose the defendant should appeal without superseding, and plaintiff should take possession pending the appeal. No one would deny that, upon reversal of the judgment, plaintiff could be compelled to restore the land.

In other words, the mere fact that a statute of procedure prescribes the form of a final judgment, has no bearing whatever upon the rights of the parties pending an appeal from it, or in case of its reversal. Anything on that subject must be found somewhere else than in the mere prescription of the form of a final judgment.

So in case of the Telegraph Condemnation Statute, Section 7 prescribes the form of a final judgment. But it says nothing whatever about what the rights of the parties shall be in the event that judgment be reversed. And it says nothing whatever as to their right *pending an appeal.* That subject is regulated by *Section 8.*

We repeat therefore that Section 8, which we have already quoted, is the only section of this statute which makes any reference to possession *pending an*

appeal. And it says *nothing whatever about passage of title.*

The differences between this section of the Telegraph Statute and the provisions of the Railroad Statute, which we have been considering, are very striking.

In the first place this Telegraph Statute does not even attempt to give the *condemnor* any right at all to take possession, *under any condition, if it takes an appeal itself,* as does the Railroad Statute.

In the second place, if the *defendant* takes an appeal, the statute attempts to give the condemnor the right to take possession, provided he *executes a bond in double the amount of the award;* thus imitating that provision of the old Railroad Statute which has been held unconstitutional. *Yet this is the only provision in the whole statute purporting to authorize the Telegraph Company even to take possession and use the property* PENDING AN APPEAL. And there was no attempt to comply with it in this case. No bond of any kind was given by the Telegraph Company.

Counsel for the Telegraph Company very naively suggest that Section 8 was not complied with in the case at bar, because the "appeal" was not taken within thirty days after the judgment, as required by that section. Of course it was not. No *appeal* at all was taken. Defendant had to take a writ of error as required by the Federal practice. But, say counsel, the federal practice does not permit a supersedeas, unless a bond in the form prescribed by the

federal statute is executed within sixty days after the judgment, and that no such bond was executed within that time by the defendant Railroad Company. Of course it was not. No such bond was executed at any time. There was no occasion for a supersedeas. The Telegraph Company was already in possession, had been in possession since before the suit began, and was being held in possession by the injunction in the equity suit. There was nothing to be accomplished by a supersedeas.

But all this is entirely beside the mark. A supersedeas only affects the rights of parties *pending an appeal.* It has nothing to do with the *effect of a judgment of reversal.*

The meaning of our reference to Section 8 of this statute is this: We say there is not one word in this statute which says that upon the entry of the judgment the Telegraph Company may *pay the amount of the judgment,* either to the defendant or into Court, and thereupon take possession and secure title, *notwithstanding an appeal.* We are discussing the meaning and intent of the Legislature. And we say that Section 8 of the statute which regulates the matter of appeal, under State practice of course, shows the Legislature manifestly had no such intent. If the condemnor appeals the statute gives him no right at all, under any conditions, to take possession pending the appeal. And, on the other hand, if the defendant Railroad Company appeals, *it* does not have to execute a supersedeas bond to keep the Telegraph

Company from taking possession; but the statute says in effect that in the event the *Railroad* Company appeals, the *Telegraph* Company shall not take possession unless IT, the *Telegraph Company*, shall execute a bond in *double the amount of the judgment*. And it is only "upon the execution of such bond" that it "may construct its telegraph line upon the right of way." The execution of that bond *by the* **plaintiff** is *no part of the* **defendant's** *appellate procedure*. It is simply the condition, and the only condition, upon which this statute gives the plaintiff a right even to *take possession* pending an appeal by the defendant. And there is not a suggestion as to its thereby acquiring *title*.

It is said the amount of the award was *paid into Court*. But there is nothing in the Telegraph Statute giving the Telegraph Company the right to take possession pending an appeal by defendant, *upon paying the award into Court*—not a suggestion of such a thing in the Statute. The idea of the draughtsman of the Statute seems to have been along the general lines of the original Railroad Statute, though it is very poorly expressed. The Railroad Statute which the Court of Appeals condemned in Covington Short-Route Ry. v. Piel, 87 Ky. 267 (*supra*), authorized the condemnor to take possession upon executing "to the owner a bond with surety, to be approved by the County Court, in double the amount of the damages assessed, conditioned to perform the judgment of said Court, and of any Court to which the case may

thereafter be appealed" (87 Ky. 269). And some such idea was evidently in the mind of the author of this Telegraph Statute (who evidently did not know the Court of Appeals had held a similar provision in the Railroad Statute unconstitutional). His thought apparently was that, as the defendant on appeal might reverse the judgment, and then, on another trial might secure a larger verdict, therefore the condemnor, if he wanted to take possession pending defendant's appeal, ought to be required to give bond for *double the amount* of the existing award, to cover any probable increase on another trial. There is no doubt that this was the theory of the old Railroad Statute. But the language of the Telegraph Statute as to the terms of this bond is very peculiar and seems to us to be absurd. It is to be "in double the amount of the award *payable to the defendant in case said cause shall be reversed.*" If the judgment is *affirmed* the bond is not payable to all, although the condemnor is in possession of the property, using it. The bond is required to be in "double the amount of the award," and yet it is payable only in the event that award is set aside. It was probably the purpose of the author of the Statute to provide a bond (as in case of the Railroad Statute) to pay whatever judgment *might thereafter be rendered.* But the form of bond prescribed does not say this. It seems to us to be an absurdity. Therefore, even if this section of the Statute were not unconstitutional, as it clearly is,

it would be unenforcible and ineffective for other reasons.

Yet this is the only provision of the statute which even attempts to give the Telegraph Company a right to take possession pending an appeal by the defendant. The statute says that the Telegraph Company "*upon the execution of such bond may construct its telegraph line upon the right of way.* And that is the only right it gives pending the appeal.

Therefore manifestly the attempt to confer even the right to enter and take *possession* pending an appeal is futile. And there is not a word in the statute about the *passage of title,* except of course as the result of executing a judgment that remains unreversed. There is not a suggestion in the statute that compliance with a judgment which is afterwards reversed and set aside shall confer title.

As said before, the Statute does not attempt to give the Telegraph Company the right to enter pending an appeal by defendant upon *paying the amount of the award, either into Court or to the defendant.* It attempts to give the right upon another and different condition, viz., the execution of a bond in double the amount of the award. And the fact that the condition thus prescribed turns out to be unconstitutional, does not authorize the Court to give the right upon the performance of *some other condition,* or upon *no condition.* And much less does it authorize the Court to say that *title passes,* and passes irrevocably, under conditions nowhere to be found in

the statute. The Court cannot write a provision into a statute, and especially when to do so is manifestly contrary to the plain intent of the statute, even though awkwardly or ineffectively expressed. This statute *manifestly did not mean* that, in case of an appeal by the Railroad Company, the Telegraph Company should take *either possession or title,* by merely paying the amount of the County Court judgment. And much less is there anything indicating that under such conditions title shall pass *irrevocably,* and shall not be affected by a subsequent reversal of the judgment of condemnation.

And it is further manifest that the mere fact that in this particular case the Telegraph Company had entered and taken possession of the property many years ago under *an agreement for possession, which it itself terminated,* does not give it any better right, or any more *title to the property* it sought to condemn, than it would have had without this possession. This is a proposition which has been asserted twice by the Circuit Court of Appeals in the course of this litigation and it is not necessary to elaborate it. (249 Fed. 395; 268 Fed. 9.)

It does not seem to us necessary to enter upon a consideration of the constitutionality of a Statute in Kentucky authorizing a Telegraph Company to pay the amount of an award of damages into Court, where the property is encumbered by mortgages, and where the mortgagees are not parties to the record and have had no notice of the proceedings, and thereupon to

enter and take possession of the property and acquire title thereto *pending an appeal by the defendant;* BECAUSE WE HAVE NO SUCH STATUTE; and it is, of course, useless to consider whether or not such a Statute would be valid if it existed.

In conclusion on this point we, therefore, submit that this Telegraph Statute furnishes absolutely no foundation for the claim that the Telegraph Company, as soon as it gets a verdict fixing the amount of the damage, can pay the amount, either to the defendant or into Court, and thereby acquire a title to the land sought to be condemned, which will be undisturbed by a subsequent reversal of the judgment. There is absolutely no authority for saying that such a result could be accomplished even under the Railroad Condemnation Statute. And still less ground is there for claiming that such a result can be accomplished under the Telegraph Statute. There is absolutely nothing in the Statute which authorizes this extraordinary claim. And, as said by the Circuit Court of Appeals in the equity case:

> "When plaintiff recovers a judgment upon conditions, he surely can not, by immediate performance of the conditions deprive the defendant of the right to go to the reviewing Court and get the judgment set aside" (268 Fed. 8, 9; Rec. 204).

It results, therefore, that the Telegraph Company had not acquired any vested right to the property sought to be condemned when its power to condemn

was withdrawn. And this is what the Circuit Court of Appeals held in a suit between these same parties, a suit brought by this Telegraph Company, and in which it invited a decision of this identical question, *in order that it might not have to be decided in this condemnation case.*

CONDITIONS PRECEDENT TO TAKING DEFENDANT'S PROPERTY HAVE NEVER BEEN MET OR DETERMINED.

Section 242 of the Kentucky Constitution is as follows:

> "§242. PRIVATE PROPERTY—TAKING OF FOR PUBLIC PURPOSES—APPEAL—TRIAL BY JURY. Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual, made by commissioners or otherwise; *and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases,* BE DETERMINED BY A JURY, *according to the course of the common law.*"

Thus it will be seen how careful the Constitution makers of the State of Kentucky were to provide for the ascertainment of what is just compensation for a man's property, before it is permitted to be taken from him. It is thus provided in the Constitu-

tion itself that this compensation must be determined *by a jury* according to the course of the common law. The landowner was not to have his property taken from him on the preliminary assessment of some commission, or of some Sheriff's jury in the country, or by the determination of some Judge, but only "by a jury according to the course of the common law."

Now the fact is that the amount of the compensation which the Telegraph Company hastened to pay into Court in this case, and which was a mere nominal amount of *$5.00 a mile,* was not really fixed *by a jury.* It was so *in form,* but not *in fact,* and not within the spirit of the Constitution of Kentucky. We have already stated that when the compensation to be paid for the property taken by the Telegraph Company and the damage to the remaining property of the Railroad Company were really submitted to a jury, and the jury was really allowed to determine it, they fixed the compensation at $500,000.00. That verdict, however, was set aside by the Court; and when the next trial approached, the Court itself, without the aid of a jury, first determined the question of necessity for the taking and the other question of similar nature, to wit, as to whether or not the taking would unreasonably interfere with the use of the railroad right of way, and then it ordered a jury trial on the question of damages. But when that trial came on, the Court *took the case away from the jury, and directed it to find a verdict for $5,000.00.* As said by the Circuit Court of Appeals—

> "There having been a preliminary determination by the Court that the necessary precedent conditions existed, there was a trial before a jury as to the amount of damages, which resulted *in a directed verdict for $5,000*" (249 Fed. 388; Rec. 211).

The District Court practically adopted the view of the counsel for the Telegraph Company, which is thus expressed by the Circuit Court of Appeals:

> "The Telegraph Company urges that the Railroad Company is entitled only to nominal damages, and hence that questions of evidence on the subject of damages are immaterial" (249 Fed. 396; Rec. 219).

While the bill of exceptions made upon that trial has not been made a part of the present record, yet the Court can form a fairly correct idea of the attitude of the Court from examining the assignment of errors, which is a part of this record, and particularly Part 3 thereof; because in the assignment, acting in accordance with what we understood to be the requirements of the law, we stated the substance of what each witness would testify to, and the qualifications of the witness, in assigning as error the Court's exclusion of his testimony. This begins on page 233 of the record, and from it the Court will see that the District Court excluded the testimony of such witnesses as the defendant Railroad Company's Chief Engineer (Mr. Courtenay) and the testimony of the Chief Engineers of the Illinois Central Railroad Co., the Atlantic Coast Line Railroad Company, and the Nashville,

Chattanooga & St. Louis Railway Company's Chief Engineer; also the testimony of plaintiff's President, Mr. Milton H. Smith, and its Electrical Engineer, Mr. Fugina, and of its various superintendents, all on the ground that these witnesses were not qualified to testify as to the damages. And then in conclusion, after having rejected practically all of the testimony that the defendant offered to prove its damage, the Court wound up the trial by *commanding the jury to find a verdict for $5,000.*

This was in no true sense the fixing of damages by the verdict of a jury. If substance counts for anything in law, this was nothing but the finding of a Judge. The damages to which this property owner was entitled, before its property could be taken from it, *were never fixed by a jury* in the sense which was intended by the makers of the Constitution of Kentucky. Yet this is the verdict, the amount of which the Telegraph Company was in such a hurry to pay into Court, and the payment of which it is now claiming gave it the title, the irrevocable title, to the property of the Railroad Company, a title of which it could never be deprived, according to plaintiff's claim, no matter how many errors, nor how flagrant errors, nor what kind of errors, may have been made by the Court which held the trial. And this is the verdict which the Circuit Court of Appeals set aside in reversing the judgment based upon it.

Again, not only was there no determination *by a jury* of the amount of damages in any real constitutional sense, but the Circuit Court of Appeals on the

trial of the writ of error found that the District Court had erred also upon the trial of some of the preliminary questions, *questions as to conditions precedent to the right to condemn,* and reversed the judgment on that ground also, as well as upon the ground of error in the trial before a jury on the question of damages; and for this reason set aside the finding of the Court on these questions as to the *right to condemn,* as well as the so-called verdict of the jury, which again was a mere finding of the Court on the question of damages. It is true the Circuit Court of Appeals said that under the testimony the Court was justified in finding the existence of necessity, and as to most of the right of way it was justified also in finding that there was no unreasonable interference; but at the same time the Court said that as to certain places, certain sections of the road, there was reasonable ground for claiming under the evidence that the interference with the railroad use was "too serious to permit condemnation." And accordingly the Circuit Court of Appeals set aside the verdict of the District Court on the trial held by the Court without a jury and remanded the case for further trial.

It is probably well to call the Court's attention somewhat more particularly than has been already done heretofore, to just what was the nature of the errors assigned, and which were complained of on the trial of the writ of error following the entry of the condemnation judgment, and the manner of disposing of these by the Circuit Court of Appeals.

In its assignment of errors upon which defendant relied as against the condemnation judgment, defendant assigned three classes of errors, (1) errors occurring *prior to the trial*, (2) errors occurring during the trial *by the Court alone*, without a jury, and (3) errors occurring at the *jury trial* (Rec. 226).

The Circuit Court of Appeals in its opinion did not deal with the errors specifically, one by one, but simply announced certain general principles, from which it could be seen wherein the Court below had erred. Those principles showed that the District Court had erred both in its trial without a jury and upon the jury trial.

We may thus illustrate what we have just said: The Court, without a jury, tried the question of "necessity" for the condemnation, and also the question of unreasonable interference, by which is meant this: The Telegraph Condemnation Statute (§1) provides that the telegraph line shall be so constructed on the right of way "as not to interfere with the ordinary use or ordinary travel on such * * * railroad." And the District Court, treating this as a condition precedent to the right to condemn, tried this question, as well as the question of necessity. In fact the Circuit Court of Appeals says that this question of interference is but a branch of the question of necessity.

Upon the trial before the Court on the question of interference the Railroad Company insisted that its operation of *its own telegraph or telephone line* was a part of its "ordinary use" of its right of way, and

that if the construction and operation of the *plaintiff's* telegraph line would interfere with the construction and operation of *defendant's telegraph line,* then this was, within the meaning of the statute, an interference "with the ordinary use" of the railroad right of way. And it put a witness on the stand to prove the fact that the existence of plaintiff's line would very largely interfere with the construction and operation of defendant's telegraph, telephone or signal lines. The District Court, however, ruled that the operation of defendant's telegraph, telephone or signal lines could not be considered an "ordinary use" of its right of way and, therefore, no testimony as to interference with that use was competent or material. And defendant in its assignment of errors, being assignment No. 26, complained of the Court's excluding testimony of a witness, which was to the effect "that the existence of plaintiff's line would to a large extent interfere with the construction, maintenance and operation of defendant's telegraph, telephone or signal lines" (Rec. 230). The Circuit Court of Appeals, however, decided and said in its opinion that "The use by a railroad of its right of way for constructing and maintaining its own telegraph, telephone and electric signal lines is use for a railroad purpose"; that "a railroad can no more operate without a telegraph, telephone and electric signal system than it can without tracks or cars" (Rec. 217; 249 Fed. 394).

The announcement of this principle showed of

course that the District Court had erred in its trial upon the question of interference, in holding that testimony as to interference by plaintiff's line with defendant's electric lines was immaterial and in rejecting the same upon that trial.

After laying down the general principles, which the Court held to be applicable to the case, the Court in the latter part of its opinion, taking up specifically the matter of the preliminary trial by the Court, in the absence of the jury (Rec. 223; 249 Fed. 400), holds that the testimony supported the finding of the Court on the broad issue of necessity and of "general interference"; but that there were parts of the right of way, though comparatively small parts, where it might reasonably be claimed that the interference with the railroad use was *too serious to permit condemnation.* On this subject the Court said:

> "For illustration, there may be bridges or tunnels or other structures or short sections of the right of way already so fully occupied that there is no room for another telegraph line in addition to that to which the railroad is entitled for its own use—that is to say, where another line cannot be so placed that it will not substantially obstruct the use by the railroad of its right of way for some railroad purpose" (Rec. 223; 249 Fed. 401).

The Court says it is not important to examine the details in the particular just suggested, because, the Court says that before another trial can be had these conditions may change, and that the question, of

whether or not such interference exists along a particular section of the right of way as to justify a refusal of the right to condemn, must be determined according to conditions as they exist at the time the new trial is had. The Court says:

> "Upon the new trial, disputable questions of necessity—*i. e.*, the forbidden degree of interference—may be found to exist as to specific locations here and there upon the line, regardless of whether the controlling conditions existed at the former trial or have arisen since. If the Railroad Company's telegraph line at these spots can be built—or, if already built, can be operated—with reasonable safety and without prohibitive expense, then an award of damages will meet the case; *if not, these particular locations should be exempted from the condemnation*" (Rec. 224; 249 Fed. 401).

Thus these questions of the character above indicated were left to be tried out by the Court upon another trial according to the facts as they should exist when such new trial should be had; in connection with which it would be necessary to consider the Circuit Court of Appeals' ruling to the effect that the erection and use by the *defendant* of its *telegraph line* was a part of the use of its right of way which must not be unreasonably interfered with by any construction of plaintiffs.

The Court's general statement of principles also showed many errors on the part of the District Court in the admission and rejection of testimony and in the charge to the jury, on the trial before the jury.

The result of these rulings by the Circuit Court of Appeals was of course to require the setting aside both of the findings of the Court and the verdict of the jury. And this was done.

Necessarily, therefore, it would have been necessary, if another trial had been had after the return of this case to the District Court, to have another trial before the Court without a jury, in which the Court would have heard testimony on the subject of interference, and would have been required to find whether or not there was sufficient interference to justify a refusal of the condemnation at various places claimed by the defendant. Just what conclusion the Court would have reached on those questions, it is, of course, impossible for any one to know. In fact, as held by the Circuit Court of Appeals, these questions would have each to be decided upon conditions as they might exist when the new trial was had, and no one could anticipate what the evidence would show. No one, therefore, could tell what part of the right of way would ultimately be condemned and what part would not. Hence, as just seen, the Court set aside both the finding of the District Court without a jury and also the verdict of the jury, and upon a new trial it would have been necessary to determine what was to be condemned and what not, and the damage to be paid for that which was condemned, and then to enter a judgment of condemnation in accordance with the result of these trials.

But there was no power or right in the Court to hold such a trial or to enter a judgment of condemnation in such a case after the State of Kentucky had declared:

> "That no part of the right of way of any railroad company, or any interest or easement therein, shall be taken by any condemnation proceedings * * * by any telegraph * * * company."

THE ACT OF MARCH 14, 1916, IS NOT AN IMPROPER INTERFERENCE BY THE LEGISLATURE WITH JUDICIAL ACTION.

Toward the close of the brief for the Telegraph Company, it states the following proposition:

> "It is a settled principle of Kentucky jurisprudence that the Legislature can not, pending a controversy between two litigants as to their rights, pass any law affecting the decision of the case" (Brief, p. 66).

Counsel make no argument in support of this proposition, but, after stating it, they simply cite a number of cases which they say "sustain this proposition"; and then in further support of it they call attention to the opinion of the District Judge in this case "with the suggestion that Judge Evans has been a lifelong lawyer in Kentucky and familiar with its jurisprudence." We believe this is the first time we ever heard of the fact that the judge of the trial Court is a lawyer living in the State where his Court

sits, and is "familiar with its jurisprudence," given as a reason for affirming his judgment on an appeal or writ of error.

We might rest content with a mere reference to the opinion of the Circuit Court of Appeals in reversing the judgment of the District Court, in which this very question is dealt with (Rec. 205; 268 Fed. 10), as a sufficient response to the argument of counsel, and in which the Circuit Court of Appeals calls attention to the fact that the case of *Pannell* v. *Louisville Tobacco Warehouse Co.*, 113 Ky. 630, decided by the Circuit Court of Appeals long after any of the cases relied upon by the Telegraph Company were decided, shows beyond controversy that counsel's construction of the meaning and effect of those former cases is erroneous; it being impossible to distinguish the principle of the Pannell case from the principle controlling the case at bar on the point now under consideration.

But while we might rest content with the simple reference to the opinion of the Circuit Court of Appeals on this subject, we nevertheless desire to add some additional suggestions of our own.

The proposition contended for is that when a condemnation proceeding *has been once begun*, there is no power in the Legislature of the State to withdraw the power of condemnation, so as to affect the exercise of the power in the suit that has been begun.

It is difficult to understand on what foundation of constitutional law the proposition can be rested,

that the Legislature of a State has no power to pass an Act withdrawing the power of condemnation, merely because a proceeding may have been begun in the attempted exercise of such power. The power of condemnation given a corporation, such as a telegraph company, a railroad company or a milling company, is, as heretofore said, merely the grant of a part of the State's power, and *made for the public good*. The State has the power to take the property for public purposes upon making just compensation to the owner, and it can exercise this power directly in its own name, or it can grant the power to a person, whether natural or artificial. And being the mere grant of a power, of course the State can withdraw it, unless the grant has taken the form of an irrepealable contract. Of course, the withdrawal of the power can not affect the right or title to property which had already been acquired at the time the power is withdrawn. But unless title has been completely acquired by the exercise of the power, it is inconceivable how the mere beginning of proceedings in the exercise of the power can take away from the Legislature of the State the right to withdraw the power previously granted. As the exercise of the power, whether directly by the State or indirectly through some grantee of the State's power, is for the benefit of the State, therefore, it would seem entirely clear that if the State concludes that it is not well, *not for the public good*, to take property of a certain kind for certain purposes, previously authorized, the

State must have the power to withdraw the authority for taking such property at any time before it has been actually acquired. And "whether the power is exercised by the Government or by a corporation to whom that power is delegated the same rule should apply. The right is given *for the reason that the public good demands the use of the property*, and the rule applicable to the State should also apply to the corporation." (Manion v. L., H. & St. L. Ry. Co., 90 Ky. 491, 498). The State, in case of a change in public policy as to whether or not the public good demands the use of a certain character of property for a certain purpose, can of course dismiss a proceeding which it, prior to the change in policy, had instituted to take property for that purpose. And likewise, in case of such a change in policy, the State may withdraw *from its agent* the power previously granted to take property for that purpose, and may require the dismissal of a proceeding instituted for the purpose of such taking before the change in policy occurred, provided the proceeding has not been consummated by the acquisition of title to property.

The State may at one time entertain the view, as a matter of public policy, that it is promotive of public good that telegraph lines should be built and operated along railroad rights of way, and may, therefore, itself institute proceedings having for their object the taking of part of a railroad right of way for this purpose; or it may authorize a telegraph com-

pany to institute such proceedings; the good of the public being the ultimate end sought in each case. But the State's view of what is for the public good may change. It may conclude that it is not wise to permit a telegraph company to take a part of a railroad right of way for a telegraph line and to construct its line upon a railroad right of way and introduce an independent set of employes upon the railroad right of way, persons over whom the railroad company has no control. The State may reach the conclusion that this is dangerous and therefore not for the public good. And if it does reach this conclusion, surely there can be no question of the constitutional power of the State either to dismiss a proceeding which it has previously instituted in its own name to take such property for such purpose, or to withdraw the power which it has previously given to an agent of the State to take such property for such purpose, and to require the dismissal of any proceeding that has been previously instituted by the agent looking to that end, provided the proceeding has not been consummated by the acquisition of title to property.

In *Commonwealth* v. *Ewald Iron Co.*, 153 Ky. 116, the Court of Appeals of Kentucky said:

> "We know of no limitation upon the right of the Legislature to repeal or modify at its pleasure a grant of power or authority to one of its citizens that does not involve interference with a vested contract right that he has secured under the grant.

> "Subject to the exception noted, there is no statute that can not be repealed, and so there is no such thing known to our law as an irrepealable legislative Act. Cooley's Constitutional Limitations, 6th Edition, pages 143 and 343" (p. 123).

This proposition has thus been asserted by the Court of Appeals of Kentucky as applicable to the power of the Legislature of Kentucky, and even if we did not have this assertion by the supreme judicial tribunal of the State, we know it must be true. The mere statement of the proposition conclusively satisfies the mind of its truth.

Again, in *Boone County Court* v. *Snyder,* the Court of Appeals of Kentucky, June 28, 1878, in an opinion by Judge Cofer, said:

> "It is a well-settled rule that the repeal of a statute giving a right or remedy will destroy all rights and proceedings under and dependent upon it which are not so far perfected at the time the repealing Act takes effect as to stand and be enforced without the aid of the Act repealed. *Rex* v. *Justices of London,* 3 Burrows, 1456; *Butler* v. *Palmer,* 1 Hill (N. Y.) 324; *Key* v. *Goodwin,* 4 M. & P. 341." (9 Kentucky Opinions, 921.)

And as a consequence of this manifest truth, Lewis in his work on Eminent Domain says:

> "Upon the expiration or repeal of a statute" (referring to statutes of condemnation) "all inchoate proceedings founded thereon fall to the ground, unless there is a saving clause in the re-

pealing Act." (1 Lewis on Eminent Domain, 3rd Ed., §380.)

In *Endlich on the Interpretation of Statutes,* the author, in Section 480, speaking of rights and remedies founded solely upon statute and of suits pending to enforce such remedies, says:

> "If, at the time the statute is repealed, the remedy has not been *perfected* or the right has not become *vested,* but still remains executory, they are gone."

Again, in Section 486, he states:

> "In fact, in all matters of pure legislation, contract and vested rights not resulting, no one Legislature can bind another, and hence the repeal of such a statute puts an end to all proceedings pending undetermined under it. Nor can any person invoke the aid of a repealed statute who has not, previous to the repeal, acquired *vested rights* under it."

It was argued in the District Court, and the court held, that the foregoing propositions were *not true in Kentucky;* that the Legislature of Kentucky has no power to withdraw from a corporation the grant of the power of eminent domain, if a judicial proceeding in the exercise of that power has been *begun.*

This proposition is so startling that we believe it would take a case directly in point from the Court of Appeals of Kentucky to satisfy this Court of its soundness. And we are very sure that no such case can be found. It is only general language used in

some of the opinions of the Court of Appeals applicable to ordinary suits involving claims to property that counsel rely upon. The Court of Appeals of Kentucky has never in any case held that a mere power theretofore granted to an individual or a corporation could not be withdrawn by the State after a proceeding had been begun in the exercise of the power. The argument of counsel for the Telegraph Company can not stop short of insisting that the Legislature has no power to pass any Act that will affect pending judicial proceedings, or lead to a different conclusion than would have been reached if the Act had not been passed. And this is certainly not the law of Kentucky. The case of Pannell v. Louisville Tobacco Warehouse Co., 113 Ky. 630, decided long after any of the cases relied on by counsel for the Telegraph Company shows conclusively that the Legislature has power to pass a statute which will affect pending judicial proceedings and lead to a conclusion different from what would have been reached but for the passage of the statute. This case has been heretofore referred to by us in this brief on the question of the proper construction of the statute we are now considering. The opinion of the court in that case, however, gives much more extended consideration to a constitutional question of power than it does to that of construction. For convenience we again briefly state the facts of the case: The statute which was in force at the time the suit was brought provided that a warehouse-

man in settling with a shipper of tobacco should account to him for the net weight of the tobacco, ascertained in a certain way; and that if he should fail to do so, the warehouseman should be liable to the party aggrieved in the sum of not less than Twenty-five Dollars, nor more than One Hundred Dollars, for each violation of the statute. Pannell was a seller of tobacco, who claimed that the statute had been violated in his case, and that the warehouseman had incurred the penalties which he was entitled to recover. And accordingly he brought suit. At the time he brought his suit, he undoubtedly had a right to recover the penalties he sued for, if he established the facts which he charged. And in the opinion of the Court of Appeals, to which we are about to refer, it is clearly shown that at the time the action was instituted plaintiff had a right to recover. But *pending the suit* the Act upon which the action was based was repealed by the Legislature of Kentucky, and provision made that no penalty provided in the Act should thereafter be recoverable in any court of the Commonwealth. As a matter of construction, as we have heretofore mentioned, §465 of the Kentucky Statutes was relied upon as saving the penalties theretofore incurred and sued for in the pending action. But the court held that the language of the statute was so clear that it took the case out of the saving clause of §465, which is but a rule of construction. And this brought the court up to the question of the *power* of the Legislature to pass the Act, it being in-

sisted that no such power existed, special reliance being placed by Pannell on §59 of the State Constitution, which expressly forbids the passing of any local or special Act to regulate the punishment of crimes and misdemeanors or to remit fines, penalties or forfeitures. And in passing on this subject the Court of Appeals said:

> "The right to repeal a statute is not affected by this provision of the Constitution. By the repeal of the statute, at common law, the right to enforce penalties under it was destroyed. This right is saved in ordinary cases by Section 465, Kentucky Statutes; but this saving being only matter of legislative authority, may be repealed by the Legislature, and in repealing statutes it may in each case determine to what extent the Act repealed shall continue in force. By the Act in question the Legislature undertook to take out of the operation of Section 465 the repeal of the Act in controversy, and we are unable to see that this is a violation of the constitutional provision; for, were the rule otherwise, it would result that the Legislature could not repeal any statute under which penalties had been incurred, and take away from the courts power to enforce the penalty. *This would be to deny to the Legislature a power universally recognized.* Such was not the intention of section 59 of the Constitution. It inhibits the Legislature from passing any local or special act to remit penalties, but it does not affect its power to repeal any existing statute, and give to the repeal its common law effect of taking away from the courts power to enforce penalties incurred under it. The Legislature has all power that is not expressly taken away from it. In this it differs from the Con-

gress of the United States, which has only such power as is conferred upon it. *The power to repeal a statute, and take away the authority to enforce penalties incurred under it, existed in the Legislature at the time of the adoption of the present Constitution, and not being clearly taken away, remains as before. After the right to enforce the penalties has perished, the action to recover them can not be prosecuted further"* (pp. 639, 640.)

We call the Court's attention to the portion of the language above quoted in which the Court of Appeals says that if the rule were as contended for, it would result that the Legislature could not repeal any statute under which penalties had been incurred and take away from the courts power to enforce a penalty, although this would be "to deny to the Legislature a power universally recognized," and that such was never the intention of the makers of the Constitution of Kentucky. And we remind the Court that, when the Court of Appeals used the language quoted, it was writing in a case involving the validity and effect of a statute as applied to a suit which was pending at the time it was passed. So we may apply exactly that principle to the case at bar. If the rule be as contended for by our opponents, it would deny to the Legislature of Kentucky the power to withdraw from any individual or corporation a power theretofore granted, if any proceeding had been begun in the exercise of that power, although nothing had been acquired under it at the time of the

withdrawal of the power, which would be contrary to what any court has ever decided, so far as we can find. And in the Pannell case we find that the court did uphold the validity of a statute passed *during the pendency of a suit*, and did apply it to that suit, a suit in which the plaintiff had undoubtedly a right to recover the penalties referred to at the time the suit was begun, but which right was taken away by the Act passed during the pendency of the suit. As said before, this Pannell case is *later* than any case relied upon by the District Court in its opinion to support the proposition of lack of power in the Legislature to pass a statute which will affect the course of pending judicial proceedings.

None of the cases cited by counsel involve any mere exercise of a power granted by the State, or the collection of a penalty imposed by statute; and, therefore, of course none of them hold that there is no power in the Legislature to *withdraw a power* previously granted, or to *forgive a penalty* previously imposed, merely because some judicial proceeding may have been begun in the exercise of the power or for the collection of the penalty. And the case of Pannell v. Louisville Tobacco Warehouse Co. shows conclusively that the Court of Appeals of Kentucky never meant to assert any such principle.

CONCLUSION.

In conclusion we submit, as an original proposition, unaffected by any previous decision, that no right to the property sought to be condemned in this case had vested in the Telegraph Company at the time its power to condemn was withdrawn by the State.

And we further submit that this very question was heretofore decided in another suit between these same parties, a suit instituted by the Telegraph Company itself, in the course of which it expressly invited a decision in that case of this very question, in order that it might not have to be decided in this present case.

We, therefore, submit that the judgment of the District Court herein should be affirmed.

HELM BRUCE,
Counsel for Defendant in Error.

EDWARD S. JOUETT,
General Counsel.

Dec. 20, 1921.

APPENDIX.

RAILROAD CONDEMNATION STATUTE.

(Kentucky Statutes, Secs. 835-840.)

§835. **Commissioners—Appointment to Assess Damages.** When any company authorized to construct a railroad shall be unable to contract with the owner of any land or material necessary for its use for the purpose thereof, it shall file, in the office of the Clerk of the County Court, a particular description of the land and material sought to be condemned, and may apply to the County Court to appoint commissioners to assess the damages the owner or owners thereof may be entitled to receive, and thereupon the said Court shall appoint three impartial housekeepers of the county who are owners of land, and who shall be sworn to faithfully and impartially discharge their duties under this law.

§835a. **Union Stations—Land may be Condemned for.** All corporations or companies organized under the laws of this or any other State for the purpose of constructing, maintaining or operating union railway stations, whether passenger or freight, are hereby vested with the right and power to acquire by condemnation such lands and material in this State as, in their discretion, may be reasonably necessary for the purpose of constructing, maintaining and operating such union railway stations and the usual or proper railway tracks, platforms, sheds, ap-

proaches and other appurtenances thereto. And when any such corporation or company shall be unable to contract or agree with the owner or owners of such land or material it may, in the mode prescribed by law for the condemnation of land and material by railroad companies, condemn and acquire the same, or so much thereof, as, in its discretion, may be necessary for the purposes aforesaid. (This section is an act of March 21, 1906.)

§836. **Assessment of Damages by Commissioners.** It shall be the duty of said commissioners to view the land and material, and to award to the owner or owners the value of the land or material taken, which shall be stated separately; and they shall also award the damages, if any, resulting to the adjacent lands of the owner, considering the purposes for which it is taken; but shall deduct from such incidental damages the value, if any, of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. They shall return a report in writing, to the office of the clerk of said court, stating their award, and shall describe, in their report, the land and material condemned, give the names of the owners, and whether non-residents of the State, infants, of unsound mind, or married women. (See Con., secs. 13, 242.)

§837. **Report of Commissioners—Proceedings Upon.** Upon the application of said company, and upon filing such affidavits as may be necessary, the

clerk of said court shall issue process against the owners to show cause why the said report should not be confirmed, and shall make such orders as to non-residents and persons under disability as are required by the Civil Code of Practice in actions against them in the circuit court.

§838. **Confirmation of Report at Appearance Term, if not Excepted to.** At the first regular term of the county court, after the owners shall have been summoned the length of time prescribed by the Civil Code of Practice before an answer is required, it shall be the duty of the court to examine said report, and if it shall appear to be in conformity to this law, and to the extent that no exceptions have been filed thereto by either party, it shall confirm said report as against the owners not excepting.

§839. **Trial of Exceptions—Assessment of Damages—Appeal—When Company may Take Possession.** When exceptions shall be filed by either party, the court shall forthwith cause a jury to be impaneled to try the issues of fact made by the exceptions, and each juror shall be allowed one dollar per day for his services, to be taxed as cost. In assessing the damages the jury shall be governed by the rule prescribed in section 836 of this law, and, upon the request of either party, may be sent by the court, in charge of the sheriff, to view the land or material. If sufficient cause be not shown for setting aside the verdict, the court shall render judgment in conformity thereto, and shall make such orders as may be proper for the

conveyance of the title upon the payment of the damages assessed. Either party may appeal to the circuit court, by executing bond as required in other cases, within thirty days, and the appeal shall be tried *de novo,* upon the confirmation of the report of the commissioners by the county court, or the assessment of damages by said court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the county court when the damages are assessed by said court, and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land and material, and to use and control the same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the county court by the company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs. All money paid into court under the provisions of this law shall be received by the clerk of the court and held subject to the order of the court, for which he and his sureties on his official bond shall be responsible to the persons entitled thereto. (See Con., sec. 242.)

§840. **Appeal, How Taken—Costs on Appeal, by Whom to be Paid.** The appeal from the county court shall be taken by filing with the clerk of the court to which the appeal lies a statement of the par-

ties to the appeal, and a transcript of the orders of the county court, and thereupon the said clerk shall certify to the clerk of the county court that said appeal has been filed, and the clerk of the county court shall immediately transfer the original papers to the clerk of the court to which the appeal is pending; and if the owner on his appeal shall fail in the circuit court to increase the amount of damages awarded in the county court, he shall pay all the costs of the appeal; if the damages are increased in the circuit court, the other party shall pay all the costs of the appeal. The same rule as to payment of costs shall apply when the appeal is prosecuted by the party seeking to condemn land.

TELEGRAPH CONDEMNATION STATUTE.

(Kentucky Statutes, Sec. 4679c, Sub secs. 1-12.)

§4679c. 1. **Right of to Erect and Operate Lines** That a telegraph company chartered or incorporated by the laws of this or any other State shall, upon making just compensation, as hereafter provided, have the right to construct, maintain and operate telegraph lines through any public lands of this State, and on, across and along all highways and turnpikes, and across and under any navigable waters, and on, along and upon the right of way and structures of any railroad in this State: Provided, That the posts, arms, insulators, and other fixtures of such telegraph lines be erected and main-

tained in the usual manner of constructing, operating and maintaining telegraph lines on or along and upon the right of way of railroads, and on, across and along the highways, and across and under navigable waters, and in such manner as not to interfere with the ordinary use or the ordinary travel and traffic on such highways, railroads or waters, or that of any other telegraph line already constructed on the right of way of any railroad.

2. **Contract for Right of Way Along Railroads and Highways.** That whenever any telegraph company desires to construct, operate and maintain its lines on, along or upon the right of way and structure of any railroad, or upon and along the roadways of any incorporated turnpike, it may through an authorized agent agree and contract with such railroad and turnpike companies for such right.

3. **Petition for Condemnation Proceedings may be Filed.** That in case any telegraph company having the rights and privileges herein granted is unable to agree with such railroad or turnpike company for the exercise of such rights and privileges, such telegraph company may file its petition, sworn to by its agent, in the office of the clerk of the county court of any county in which any portion of such railroad or turnpike is situated or may run, and one proceeding shall be sufficient to condemn the right of way herein provided for of any railroad or turnpike in this State. Said petition shall designate the railroad or turnpike as the case may be, and the par-

ticular use, right, easement or privilege sought to be condemned, and shall state the name of the petitioner, where incorporated, how, and in what manner, and with what kind of material it proposes to construct its telegraph line, and that it has complied with the Constitution of this Commonwealth in regard to such corporations seeking to exercise right of eminent domain. An application in writing by an authorized agent of such telegraph company, delivered to the president or any general officer of any railroad or turnpike company, proposing to agree with such company upon the compensation to be paid and offering therefor a sum certain for such rights and privileges, not accepted in ten days thereafter, in writing by such president, general officer, or some one else duly authorized, may be treated as a failure to agree with such railroad or turnpike company.

4. **Proceedings upon Petition — Summons — Jury — Oath to Jury.** That such petition, as hereinbefore provided for, may be filed at any time, and the proceedings thereunder had shall be *in rem* against such railroad and structures and turnpike roadway, and, upon the filing of such petition, the clerk of said county court shall issue a summons, which shall be executed by the sheriff, upon any agent of such railroad or turnpike company in said county notifying such railroad or turnpike company of such proceedings and to appear to the next term of the said county court to be held in and for said

county, and make any lawful defense thereto if it sees proper so to do. This summons must be served upon such agent at least ten days before the terms of court to which it is returnable, and such clerk shall also issue a writ of *fieri facias,* commanding the sheriff to summons and have on the first day of said court to which said cause is returnable, a special venire of eighteen good and lawful men, citizens and qualified jurors of said county to serve as jurors in said cause. To which jurors either party may have as many challenges, and for the same causes, as in the trial of other civil causes in the circuit courts of this Commonwealth, and from said special venire and talesman, if necessary, a jury of twelve shall be impaneled, who shall be sworn by the clerk or judge of said court, as follows "I do solemnly swear that as a member of this jury, I will a true verdict render in this cause, assessing for the defendant the actual cash value of so much of its land as may be shown by the proof will be actually taken and occupied by the petitioner, and such other incidental damages, if any, as shown by the proof will accrue to the remainder of the right of way for the purpose for which it is held by the defendant, by reason of the construction of petitioner's telegraph line in the manner set out in the petition, so help me God."

5. **Evidence that may be Introduced—Measure of Damages.** That the court shall admit any relevant testimony either party may offer to prove the

cash market value of the land that will be taken and occupied by the petitioner, and all actual damages that will accrue to the defendant in the diminution of the value of the remainder of its right of way for railroad or turnpike purposes, as the case may be, by reason of the construction of the telegraph line upon such right of way in the manner set out in the petition, and in considering incidental damages to the defendant, they may take into consideration any advantages that may accrue to the defendant as shown by the proof, by reason of the construction of such telegraph line.

6. **Verdict—Form of.** The jury shall not be required to go upon or view such right of way, and shall return their verdict on the form following: "We, the jury, assess the damages and just compensation to be paid.....by the..... to be dollars.....;" and the form of the verdict may be given the jury by the court.

7. **Judgment, Form of.** That upon the return of the verdict the court shall enter up a judgment as follows: "In this case, the claim of..... Telegraph Company, to have condemned for its use the right to construct, operate and maintain the line of telegraph upon the right of way of the defendant in this State, in the manner set out in its petition, was submitted to a jury composed of (here insert the names), on the.....day of.....A. D., ..., and said jury returned a verdict fixing said defendant's due compensation and damages at dol-

lars....., and the verdict was received and entered. Now upon payment of said award either to the defendant or to the clerk of this court, and all costs in this behalf expended, said.....Telegraph Company may enter upon said land and appropriate so much thereof as may be necessary, as prayed for in its petition."

8. **Appeal—Supersedeas Bond and Effect.** That either party shall have the right to appeal from said judgment to the Court of Appeals, within thirty days after the rendition of said judgment, upon entering into bond with sureties, to be approved by the court or judge in vacation in the sum of two hundred dollars, conditioned to pay all costs that may be adjudged against it if said cause shall be affirmed. But an appeal by the defendant shall not operate as a supersedeas provided the telegraph company shall enter into bond with sureties to be approved by the court in double the amount of the award payable to the defendant in case said cause shall be reversed, and upon the execution of such bond may construct its telegraph line upon the right of way as prayed for in its petition.

9. **Mortgagee Need not be Notified—Proceeding if Mortgage on Land Condemned.** That no notice of the condemnation proceedings herein provided for shall be given to any mortgagee of the defendant, but in the event there be any mortgage recorded in the county where such proceedings are had, upon the property condemned, then the damages and com-

pensation awarded by the jury shall be paid to the clerk of said court, whose duty it shall be forthwith to mail written notice of such proceedings, and of said award to the mortgagee or trustee named in said mortgage, who may contest with the said defendant for the same, if he sees fit so to do.

10. **Damages Assessed at Instance of Railroad or Turnpike—Effect of Tender.** That if any telegraph company has heretofore constructed its line of telegraph upon the right of way of any railroad or turnpike company in this State, such railroad or turnpike company shall petition the county court of any county through which said line is constructed, to have its damages and compensation assessed against such telegraph company, and like proceedings shall be had as if instituted by such telegraph company as herein provided for, and the payment by such telegraph company of the award that may be made in such case, shall entitle such telegraph company to maintain and operate its telegraph line as if it had been constructed by virtue of this act, and in such proceedings the telegraph company shall pay the cost of such suit, unless it shall, before such suit be instituted, offer to pay such railroad or turnpike company a sum more than the award of the jury, and, if the award of the jury be less than the sum offered by such telegraph company for such right or privilege, then the cost of said proceedings shall be adjudged against such railroad or turnpike company, as the case may be, and the failure to in-

stitute such proceedings by such railroad or turnpike company within ninety days after this act shall take effect, be a waiver of its right to recover damages in any amount or in any proceedings against such telegraph company for the use and occupation of so much of its right as is used by said telegraph company.

11. **Compensation of Court Officers and Jury.** That the officers of the said court and the jury shall be allowed the same compensation for their services as by law are allowed in civil suit for like services.

12. **Repealing Clause.** That all laws in conflict with this act be, and the same are hereby, repealed. (This section is an act of March 19, 1898; the numbers of the subsections are the numbers of the sections of the act.)

REPLY BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 259.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

versus

LOUISVILLE & NASHVILLE RAILROAD CO.,
Defendant in Error.

Reply Brief For Plaintiff in Error.

ALEXANDER POPE HUMPHREY,
For Western Union Telegraph Company, Plaintiff in Error.

RUSH TAGGART,
FRANCIS R. STARK,
W. OVERTON HARRIS,
Of Counsel.

December 29, 1921.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

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IN THE

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

Our brief upon the main questions involved in this case is so full that we do not believe we should trespass upon the time of the Court in attempting to repeat the propositions which we therein endeavor to maintain.

1. We do not understand that the counsel for the Railroad Company controvert the proposition that where there are encumbrances on property to be condemned the Legislature can constitutionally provide that the amount of the compensation may be paid into Court.

2. In reference to the effect of a judgment as vesting title in the condemnor we have cited all the Kentucky cases which we have been able to find and

which seem to us to be relevant, and have made such comments upon them as we believe to be pertinent.

The argument of counsel for the Railroad Company rests upon the proposition that while the condemnor, upon satisfying the judgment, obtains a right to possession, no title vests and the legal possession is in the air until the final determination of the controversy; that up to the time of this final determination, the Legislature has the right to put an end to the proceedings and in that way to make the possession of the condemnor unlawful and entitle the condemnee to re-enter into possession.

In response to this argument we have, on page 23 of our brief, quoted the language of the Railroad Condemnation Statute as follows:

> "When the amount has been paid the railroad company shall be entitled to take possession of said land and material and to use and control the same for the purpose for which it was condemned as fully as if the title had been conveyed to it."

On page 24 of our brief we have called attention to the language of the judgment prescribed in the Telegraph Statute, as follows:

> "Now upon payment of said award either to the defendant or to the clerk of this court, and all costs in this behalf expended, said telegraph company may enter upon said land and appropriate so much thereof as may be necessary, as prayed for in its petition."

We have there showed the meaning of the word "appropriate."

We have also called attention to the following expressions of the court, which seem to us to be entirely inconsistent with any such distinction attempted to be made by the counsel for the Railroad Company.

Thus on page 34 of our brief we say:

> "In Covington Short-Route R. Co. v. Piel, 87 Ky. 268, the court decided, as noted above, that the condemnor could not enter upon giving a bond. In the course of this opinion, however, the court said:
>
> "'While the statute does not, in express terms, deny to the owner the right to supersede the judgment in a case like this, it provides that the corporation, when taking the appeal, may take possession of the property upon executing a bond to the owner in double the amount of the damages assessed, excluding necessarily his right to prevent the public use by superseding the judgment, and thereby delay the progress of the work until the end of the litigation.'"

On page 36 of our brief we quoted from Chicago, &c., Ry Co. v. Sullivan, 24 Ky. L. R. 860, 80 S. W. 791, as follows:

> "*But I entertain no doubt, however, that upon the payment or tender to the defendant that the railroad company is entitled to the immediate possession of the land condemned as fully as if the title had been conveyed to it, even if the defendant elected to prosecute an appeal.*" (Our italics.)

Again, on page 38 of our brief we quoted from the case of Madisonville Co. v. Ross, 126 Ky. 138, as follows:

> "The value of the statute would be very nearly destroyed if the railroad corporation could not take possession of the property pending the appeal, by paying into court or to the owner the sum assessed as the value of the property."

Again, on page 40 of our brief, we quoted from the case of Manion v. Louisville Co., 90 Ky. 494, as follows:

> "The statute expressly provides that when the corporation or railway company pays the damages and all costs, or makes a tender to the owner of the amount, the company shall be entitled to enter and use and control the property for the purpose for which it was condemned. The corporation has no interest in the property until this is done, nor is *the owner divested of his title*, in whole or in part, until this provision of the statute has been complied with. As said in Lamb v. Schottler, 54 Cal. 327, 'in a legal sense the land has not been taken until the act transpires which divests the title or subjects the land to the servitude.' When compensation is made under the statute of this State the title vests, and not before, and the owner of the land holds it up to that time as if no condemnation had taken place."

Again, on page 31 of our brief, we quoted from the case of Treacy v. E. L. & B. S. R. R. Co., 85 Ky. 271, as follows:

"If therefore, the appellee's proceedings in the county were a sufficient compliance with the conditions precedent to its right to acquire right or title to the land, then the lower court should have re-tried the case under the provisions of the charter, because, in such a case, the appellee, having actually acquired a right to the property, by virtue of its charter remedies, the Legislature could not, by a subsequent Act, repeal the charter remedy so as to change or affect the appellee's vested rights thereunder.

"On the other hand, if the appellee failed to comply with the conditions precedent to its right to acquire right or title to the land, then the court should have proceeded to re-try the case *de novo* under the Act of 1882, because the appellee having acquired no vested right to the land or any interest therein by its proceeding, the repeal of the charter remedy left appellee without a right to proceed further under its charter. And it could only complete its right to condemn the land by conforming its proceedings to the provisions of the repealing Act."

We submit that it is impossible, in view of these decisions, to contend that the condemnor does not acquire title as well as right of possession whenever there has been a jury trial, the amount of compensation determined and that amount paid.

In reference to the case of Cherokee Nation v. Kansas Railway Company, 135 U. S. 641-659, referred to on page 80 of the brief of the Railroad Company, we have no quarrel whatever with that case. The statutes there provided that there should be ascertainment of damages by referees, and that the condemnor might enter at once. However, if the con-

demnee objected to the award he was entitled to appeal to the Court, where there was to be a trial *de novo*. The Supreme Court simply held that under those circumstances the title did not pass until there had been this trial *de novo* and the amount awarded paid to the landowner.

The language of the Court, it seems to us, is quite clear. We quote from page 659:

> "But, clearly, the title does not pass until compensation is actually made to the owner. Within the meaning of the Constitution, the property, although entered upon, pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner."

Now this is exactly what has been done in this case.

3. In reference to the effort to plead *res judicata*, we submit that the cases cited by counsel for the Railroad Company show that when an appeal has been granted and perfected, or a writ of error has been allowed and perfected, the instant Court has lost all control over the case and has no right to make any further order.

4. We quote from 15 R. C. L. 1045, Section 524, as follows:

> "It is sound practice to plead the judgment in order to invoke it as a defense to a second action for the same cause of action, and it has been stated that as a general rule estoppel by a

former judgment has to be introduced by a special plea of *res judicata* if there is an opportunity to plead it."

Certainly the Railroad Company had the opportunity to put in this plea of *res judicata,* but failed to make any effort to do so until after the final judgment had been entered, writ of error sued out, bond given and citation served.

5. But even though this plea of *res judicata* were admitted, we submit that it can not avail. The opinion of the Circuit Court of Appeals in the injunction case was upon an interlocutory matter. The injunction suit covered the line of the Railroad Company in many States. The motion made by the Railroad Company was not to dissolve this injunction, but to modify it so as to exclude Kentucky, and was interlocutory in its character. After the opinion of the Circuit Court of Appeals was handed down in the injunction case an order was made in the Court below dissolving the injunction so far as Kentucky was concerned, to take effect at a future date.

Thereupon the Telegraph Company filed a suit in the Jefferson Circuit Court, Kentucky, setting forth the proceedings that had been taken in the condemnation suit, and insisting that the result of these proceedings was to vest in the Telegraph Company a title to the property embraced in the judgment. The Telegraph Company prayed the State Court to grant to it an injunction to last until the writ of error herein sued out should have been decided by this Court.

The Railroad Company made answer to this petition, setting out, among other things, the plea of *res judicata* now attempted to be relied upon. The Court of first instance declined, for a technical reason, to grant the injunction. Following a practice authorized by Kentucky law, the Telegraph Company applied to a judge of the Court of Appeals to grant an injunction. That judge (Honorable Wm. Rogers Clay) called into consultation with him the Chief Justice and Judges Sampson, Thomas and Settle, making in all five of the seven judges of the Court of Appeals. One of the other two judges was disqualified, having been of counsel in the case; the other judge was probably absent. At any rate, Judge Clay directed the Court of first instance to issue the injunction, delivering a full opinion upon the whole matter and considering in the argument and authorities the question of *res judicata*. We print as an appendix to this reply brief Judge Clay's opinion. We have heretofore pointed out in our main brief, at page 37, what authority in Kentucky an opinion like this has.

The case having come back to the Court of first instance an interlocutory injunction was granted, and subsequently the case coming on for hearing a final injunction was granted.

We are well aware that we have gone outside of the record in setting out what has happened in the State Court. Our excuse is that the counsel for the Railroad Company insist that this Court might as

well affirm the judgment as if the Court should reverse it the Railroad Company would have the right to put an end to it by a plea of *res judicata*. But, we submit, we could then sustain a plea of *res judicata* to the Railroad Company's *res judicata*.

The fact is, we submit, that a decision upon an interlocutory motion is not *res judicata* and that this is abundantly proved by the opinion of Judge Clay and the authorities cited by him.

6. We have never been able to see what effect could be given to the statement by counsel for both sides in the injunction suit that they desired the main question of the constitutionality of the Act of 1916 passed on. Certainly this request did not add anything whatever to the authority of the opinion of the learned Circuit Court of Appeals nor make an interlocutory order a final order.

This matter was set out in the State Court suit and is responded to by the opinion of Judge Clay.

Respectfully submitted,

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RUSH TAGGART,
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Of Counsel.

APPENDIX

APPENDIX.

COURT OF APPEALS OF KENTUCKY

FEBRUARY 14, 1921.

WESTERN UNION TELEGRAPH COMPANY, - *Plaintiff,*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Defendant.

Appeal from Jefferson Circuit Court.

OPINION BY JUDGE CLAY, SUSTAINING MOTION FOR TEMPORARY INJUNCTION.

The Western Union Telegraph Company instituted this action in the Jefferson Circuit Court for the purpose of obtaining an injunction restraining the Louisville & Nashville Railroad Company from taking possession of, or interrupting the telegraph company in the use of, its poles, wires or other apparatus situated on the railroad right of way, until its rights in a condemnation suit, then pending in the District Court of the United States for the Western District of Kentucky, were finally determined. The

railroad company first filed an answer pleading *res judicata*. Later on the chancellor permitted the railroad to file a special demurrer, and then overruled the motion for a temporary injunction on the ground that there was another suit pending between the same parties for the same cause in the District Court of the United States for the Western District of Kentucky. Thereafter a motion was made before me as Judge of the Court of Appeals to grant a temporary injunction.

The following facts appear from the pleadings and exhibits: The poles and wires of the telegraph company in Kentucky were located on the right of way of the Louisville & Nashville Railroad Company, under a written contract which either party could terminate on one year's notice in writing. On August 17, 1911, the telegraph company gave written notice that the contract should terminate at the expiration of one year from that date. On December 21, 1911, the telegraph company brought suit in the Jefferson County Court to condemn an easement along the railroad right of way. This suit, however, was dismissed, and on July 9, 1912, a similar suit was brought in the United States District Court for the Western District of Kentucky.

On August 17th, the railroad company notified the telegraph company that it would take possession of its poles and wires if they were not moved off the railroad right of way by December 12, 1912.

On November 19, 1912, the telegraph company filed its bill in the United States District Court for the Western District of Kentucky, asking for an injunction restraining the railroad company from interfering with its poles and wires until the rights of the complainant to appropriate so much of the right of way as might be necessary were finally determined. The Federal Court granted a temporary injunction which the Circuit Court of Appeals refused to dissolve.

The trial of the condemnation suit in the Federal Court resulted in a verdict fixing the damages to be paid by the telegraph company at $500,000.00. This verdict was set aside. Another trial resulted in a verdict for $5,000.00, which was rendered pursuant to a peremptory injunction. The judgment entered pursuant thereto was reversed by the Circuit Court of Appeals for the Sixth Circuit. L. & N. R. R. Co. v. Western Union Telegraph Co., 249 Fed. 385.

The condemnation proceeding was brought pursuant to Section 4679c, Kentucky Statutes, which became a law in the year 1898. In the year 1916, the General Assembly passed an Act to protect railroad companies in the use and enjoyment of their rights of way by forbidding the condemnation thereof for other purposes. Section 840a, Vol. 3, Kentucky Statutes. The effect of this Act, if applicable and valid as to the pending proceeding, was to repeal the Act of 1898, and to take away the telegraph company's right to condemn. Thereafter, the railroad

company filed in the condemnation suit, and also in the injunction suit, an amended and supplemental answer pleading in substance that the right of the telegraph company to condemn had been taken away by the Act of 1916, and moved the court not only to dismiss the condemnation proceeding, but to dissolve the injunction in so far as it was applicable to lines in the State of Kentucky. Both motions were overruled by the District Court. Thereupon the railroad company prosecuted an appeal to the Circuit Court of Appeals from the order overruling the motion to dissolve the injunction. The Circuit Court of Appeals held in substance that the Act of 1916 was valid and took away the telegraph company's right to condemn, and ordered that the injunction be dissolved as to Kentucky. The mandate, however, was subsequently modified so as to give the District Court the right to maintain the injunction for such brief period as might be necessary for the telegraph company, using care and diligence, to remove its property. The telegraph company's petition to the United States Supreme Court for a writ of *certiorari* was denied.

Relying upon the rule announced in the case of Wilson v. Milliken, 103 Ky. 165, 82 A. S. R. 578, 42 L. R. A. 449, that the pendency in a Federal Court of a prior suit, for the same *cause* and between the same parties, will abate a later action in a State court, counsel for the railroad company contend that the temporary injunction should be refused because of

the pendency of the injunction suit in the Federal Court. It is unnecessary to approve the doctrine announced in the above case. Our Code places the pendency of another suit on the same plane as all other matters of abatement, and provides that where the ground of objection, with one exception, not material, is shown to exist by a pleading, it is waived unless distinctly specified by a demurrer thereto. Civil Code, Sections 92-118. The railroad company did not file a special demurrer until after it had answered the merits. Under these circumstances, I am constrained to the view that the plea to the merits was a waiver of the objection that another suit was pending. 1 C. J., p. 42; Walton v. Washburn, 23 R. 1008; Lee v. Russell, 18 R. 951; Wilcoxson v. Martin, 129 S. W. 906.

The next question to be determined is whether or not the plea of *res judicata* is available. In support of the position that the decision of the Circuit Court of Appeals, in dissolving the temporary injunction granted by the District Court, is a bar to the present proceeding, it is argued as follows: The right of the telegraph company to continue the condemnation proceeding, as well as its right to an injunction, depended on the validity and constitutionality of the Act of 1916. Counsel for both sides asked the Circuit Court of Appeals to pass on this question, and the court did pass on it, although the question might more properly come up in the condemnation proceeding. Hence, it is insisted that there was a decision

on the merits, and this decision, having been rendered by the Circuit Court of Appeals as a court, must be regarded as a final determination that the right to condemn no longer existed, and that for this reason no injunction should be granted. It seems to be well settled that under the Act of March 3, 1891, establishing the Circuit Court of Appeals, and giving the right of appeal in case of an injunction granted or continued by an interlocutory order or decree, a final decree dismissing a bill for an injunction may be directed on the reversal of a decree for a temporary injunction, where the bill is devoid of equity on its face, and no amendment nor supplemental evidence can be offered which would change the result. Smith v. Vulcan Iron Works, 165 U. S. 518, 41 U. S. (L. Ed.) 810; Mast v. Stover Mfg. Co., 177 U. S. 485, 44 U. S. (L. Ed.) 856. Here, however, the Circuit Court of Appeals did not dismiss the bill so far as Kentucky was concerned, but merely entered an order dissolving the temporary injunction. This order was interlocutory and not final, and cannot be relied on as a bar to the pending proceeding. Union Pacific R. R. Co. v. Weld County, 247 U. S. 282, 62 L. Ed. 1110; United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 56 L. Ed. 1055; Mitchell Store Bldg. Co. v. Carroll, 232 U. S. 379, 58 L. Ed. 650; Kirwan v. Murphy, 170 U. S. 205, 42 L. Ed. 1009; Mills v. Green, 159 U. S. 651, 40 L. Ed. 293; Simrall, Etc., v. Grant, Etc., 79 Ky. 435. And the mere fact that counsel for both sides requested the Circuit

Court of Appeals to pass on the questions involved in the condemnation proceeding did not have the effect of making its decision *res judicata*, in the absence of a final order dismissing the bill so far as Kentucky was concerned.

It has long been a well recognized province of equitable jurisdiction to give ancillary aid to an action in another court by injunctive process, whenever that remedy is necessary to preserve the existing status of property until the rights of the parties are determined in the litigation then pending, provided irreparable damage may result if the existing status of the property is not preserved. Underground Electric R. Co. v. Owsley, 99 C. C. A. 500, 176 Fed. 26; Erhardt v. Boaro, 113 U. S. 538, 28 L. Ed. 1117; Fletcher v. New Orleans Northeastern R. Co., 20 Fed. 345; Livingston v. Tompkins, 4 Johns, Ch. 415, 8 Am. Dec. 598; Cromwell v. Hughes, 144 Mich. 3; Frisbee v. Timanus, 12 Fla. 300; Shaw v. Frey, 69 N. J. Eq. 321, 58 Atl. 811; Walker v. Maddox-Rucker Bkg. Co., 386, 23 S. E. 897; State, *ex rel.*, Atty. Gen. v. Frost, 113 Wis. 623, 88 N. W. 912. Our courts are always open for the protection of the rights of litigants, and the mere fact that injunctive relief is asked in aid of a suit pending in the Federal Court, and that court has denied an application for the same relief, furnishes no reason why a State Court should not grant such relief, if the ends of justice so require, unless the order of the Federal Court was *res judicata*. In determining whether such auxiliary relief

shall be granted in order to preserve *status quo* pending the determination of the rights of the parties in another suit, a court of equity will not investigate the merits of the contentions of the parties in the main proceeding further than to ascertain that substantial questions are involved, and if this fact appears, and the other elements of equitable jurisdiction are present, auxiliary relief will be given. Atty. Gen. v. McLaughlin, 1 Grant, Ch. (U. C.) 34. Indeed, it has been held that, upon application to equity to restrain a commission of waste upon land by one of the parties to a suit to determine the title thereto, pending an appeal from a decision in such suit by the lower court, the court of equity will not inquire into the validity of plaintiff's title, or investigate the strength of defendant's title; nor will the fact that the lower court in the law action decreed against the party seeking the aid of equity, holding his title papers void, prevent equity from taking such action as will protect the rights of such party in and to the property in controversy, in the event that the court on appeal holds the decree appealed from to be erroneous. Wood v. Braxton, 54 Fed. 1005. The contention of the telegraph company in the condemnation suit, as well as in this proceeding, is that the Act of 1916, depriving telegraph companies of the right to condemn an easement over a railroad right of way, is unconstitutional for the following reasons: (1) It is an interference by the Legislature with a proceeding in court. (2) The act when read in connec-

tion with Section 465, Kentucky Statutes, does not apply to the present condemnation proceeding. (3) Under the condemnation law of this State, a judgment on the verdict of the jury having been entered and the money paid, there is vested in the condemnor a right to the property condemned, subject to a new ascertainment of damages, and this right cannot be taken away by the Legislature. Under the rule above announced, it is unnecessary to go further than to say that these questions are of a substantial character, and whether or not the telegraph company's contentions will finally prevail is a question to be determined by the Federal Court. Aside from the substantial character of the questions raised, it is apparent that great and irreparable injury will result if the telegraph company is compelled to secure a new right of way and move its poles and wires, and then go to the expense of restoring them, should its right to condemn be finally upheld. The granting of an injunction under these circumstances will not interfere with the property in the custody of the Federal Court, nor will it impede in the least the orderly administration of justice in that tribunal. Its only effect will be to preserve the *status quo* until the rights of the parties are finally determined by that court. I am therefore of the opinion that the motion for a temporary injunction should be sustained, and an order will go directing the Jefferson Circuit Court, Chancery Branch, Second Division, or the

judge thereof, to issue such injunction upon the execution of proper bond.

The Chief Justice and Judges Sampson, Thomas and Settle sat with me in consideration of this case, and concur in the conclusion reached.

WM. ROGERS CLAY,
Judge of the Court of Appeals of Kentucky.

Filed Feb. 23, 1921.